

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Case No. 01-1139 (JKF)
. Adv. No. 02-2210/02-2211
W.R. GRACE & CO., .
et al., . 5414 U.S. Steel Tower
. 600 Grant Street
. Pittsburgh, PA 15219
. .
Debtors. .
. January 10, 2011
. . 9:12 a.m.
.

TRANSCRIPT OF HEARING
BEFORE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

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1 THE COURT: W.R. Grace, Bankruptcy Number 01-1139.
2 The list of participants I have by phone is Elisa Alcabes,
3 Scott Baena, Ari Berman, David Blabey, Deanna Boll, Matthew
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5 Burke, Oliver Butt, Elizabeth Cabraser, Kelli Cairns, Linda
6 Casey, Garland Cassada, Gabriella Cellarosi, Richard Cobb,
7 George Coles, Andrew Craig, Leslie Davis, Elizabeth
8 DeCristofaro, Martin Dies, John Donley, Michael Duggan, Terence
9 Edwards, Lisa Esayian, Marion Fairey, Brett Fallon, Jeffrey
10 Farkas, Debra Felder, Michael Giannotto, James Green, Sarah
11 Harnett, Douglas Herrmann, Roger Higgins, Daniel Hogan, Robert
12 Horkovich, Mark Hurford, Richard Ifft, Charles Jurgens, Brian
13 Kasprzak, David Klauder, Stuart Kovensky, Matthew Kramer,
14 Arlene Krieger, Michael Lastowski, Michael Linn, Peter
15 Lockwood, but he's in court, Edward Longosz, Ryan MacDonald,
16 Alan Madian, Kevin Mangan, Garvan McDaniel, Francis Monaco,
17 Tara Mondelli, Kerri Mumford, David Parsons, Adam Paul, Carl
18 Pernicone, Margaret Phillips, John Phillips, Mark Plevin,
19 Francine Rabinovitz, Joseph Radecki, Andrew Rosenberg, Alan
20 Runyan, Jay Sakalo, Robert Sales, Tancred Schiavoni, Darrel
21 Scott, Mark Shelnitz, Stephen Shimshak, Michael Shiner, Robert
22 Siegel, Jason Solganick, Daniel Speights, Shayne Spencer,
23 Theodore Tacconelli, David Turetsky, Michael Walsh, Edward
24 Westbrook, Jeffrey Wisler, Richard Worf and Rebecca Zubaty.
25 I'll take entries in court, please. Good morning.

1 MS. BAER: Good morning, Your Honor. Janet Baer on
2 behalf of the debtor.

3 MS. ESAYIAN: Good morning, Your Honor. Lisa Esayian
4 on behalf of the debtors.

5 MR. DONLEY: John Donley for the debtors.

6 MR. PAUL: Adam Paul for the debtors.

7 MR. WYRON: Good morning, Your Honor. Rick Wyron for
8 the PI FCR.

9 MR. FRANKEL: Good morning, Your Honor. Roger
10 Frankel also for the PI FCR.

11 MR. LOCKWOOD: Good morning, Your Honor. Peter
12 Lockwood for the ACC.

13 MR. COHN: Good morning, Your Honor. Daniel Cohn for
14 the Libby claimants.

15 MR. GIANNOTTO: Good morning, Your Honor. Michael
16 Giannotto for the CNA companies.

17 MS. DeCRISTOFARO: Good morning, Your Honor.
18 Elizabeth DeCristofaro for the CNA Companies.

19 MR. GLOSBAND: Good morning, Your Honor. Daniel
20 Glosband also for the CNA companies.

21 MR. O'NEILL: Good morning, Your Honor. James
22 O'Neill for the debtors.

23 MR. ALDOCK: John Aldock for the CNA companies.

24 MS. CASEY: Good morning, Your Honor. Linda Casey on
25 behalf of BNSF Railway Company.

1 MR. SCHIAVONI: Tancred Schiavoni from O'Melveny for
2 Arrowwood.

3 MR. RICH: Alan Rich for the PD FCR.

4 MR. WISLER: Good morning, Your Honor. Jeffrey
5 Wisler on behalf of Maryland Casualty Company.

6 MR. LONGOSZ: Good morning, Your Honor. Edward
7 Longosz on behalf of Maryland Casualty.

8 THE COURT: Ms. Baer?

9 MS. BAER: Thank you, Your Honor. Good morning.
10 Your Honor, Agenda Item Number 1 is the debtors' continued
11 twenty-fifth omnibus objection to claims. We still have a few
12 left and we're asking that that be continued to February 14th.

13 THE COURT: Excuse me. Okay, thank you.

14 MS. BAER: Your Honor, matter Number 2 was the
15 debtors' objection to the claim of the Massachusetts Department
16 of Revenue. Your Honor, by the motion we filed which was
17 matter Number 4, that matter has been settled and resolved and
18 you've entered an order, so that takes care of both Agenda
19 Items Number 2 and 4.

20 THE COURT: All right.

21 MS. BAER: Your Honor, Agenda Item Number 3, you had
22 entered an order on that. That was an insurance settlement.
23 That takes us, Your Honor, to Agenda Item Number 5 which I'd
24 like to skip for a moment. That's the CNA matter. That's
25 going to take a little more time. And I'd like to move on to

1 Agenda Item Number 6, Your Honor, which is the debtors'
2 objection to the claim of New York Hillside.

3 Your Honor, New York Hillside filed a claim for
4 \$25,000. It's an alleged environmental cleanup relating to
5 some property in Los Angeles. This related to a former Grace
6 entity, Grace Petroleum Corporation, in 1989, and this is all
7 -- this is essentially uncontested, Your Honor, in terms of the
8 facts. The documents are attached to the objection. Grace
9 Petroleum sold all interest in the property and assigned all of
10 its lease rights to oil and gas properties in 1989.

11 In December of 1992, more than three years later,
12 Grace Energy Corporation, which is a debtor, sold all of the
13 stock and interest in Grace Petroleum to a company called
14 Samson Investment Company. Samson Investment Company
15 subsequently changed the name of the company Grace Petroleum
16 Corporation to Samson Hydrocarbons Company.

17 Your Honor, when Grace filed bankruptcy in 2001 there
18 was pending a cross complaint filed by New York Hillside in a
19 litigation brought by Petro Resources, the actual company that
20 Grace Petroleum had sold and assigned its interest to in this
21 property, brought a lawsuit against Grace, Grace filed
22 bankruptcy, and at that point in time New York Hillside amended
23 its cross complaint in that lawsuit and named Samson
24 Hydrocarbons.

25 Your Honor, subsequently to that Samson Hydrocarbons

1 who had been named in that lawsuit settled all interest that it
2 had with respect to that lawsuit for \$25,000. And in that
3 settlement, Your Honor, there was a specific release that
4 released Samson who was the subsequent company to Grace
5 Petroleum Corporation all of its predecessors in interest, its
6 successors in interest, its partners, subsidiaries, affiliates.
7 It was a full and complete release, Your Honor. Samson
8 essentially settled what would have been the Grace Petroleum
9 obligation.

10 Thereafter, Your Honor, Samson actually filed a proof
11 of claim against Grace here in the Chapter 11 case because when
12 Grace Energy sold Grace Petroleum to Samson Hydrocarbons there
13 was an indemnity. And so, Samson Hydrocarbons here in the
14 bankruptcy case is pursuing Grace for the \$25,000 it paid to
15 New York Hillside.

16 What we have here, Your Honor, is essentially New
17 York Hillside is trying to get a separate and an additional
18 \$25,000 from Grace on an obligation that Samson settled for the
19 only entity that had any potential obligation in any
20 relationship to the property, Grace Energy -- I'm sorry, Grace
21 Petroleum Corporation. And that has been paid. Samson's made
22 its claim against Grace and New York Hillside's essentially
23 trying to double-dip here.

24 And, Your Honor, for those reasons we filed the
25 objection. We filed all the documents which set forth the

1 various facts, and, Your Honor, last week we filed an affidavit
2 from Samson that made two specific points; Number 1, that
3 Sampson never operated on this property. In fact, the
4 operations of the property to the extent Grace Petroleum was
5 involved ended more than three years before Samson bought Grace
6 Petroleum Corporation.

7 There was no independent operations by Samson, no
8 obligation whatsoever, no involvement with Samson in that
9 property. And that the only settlement that was done here was
10 Samson settling Grace Petroleum Corporation's potential
11 obligation to New York Hillside. Under those circumstances,
12 Your Honor, we would ask that the New York Hillside claim
13 against Grace be disallowed.

14 THE COURT: All right. Who's representing New York
15 Hillside, please?

16 MR. JURGENS: I am. Charles Jurgens, Your Honor.

17 THE COURT: All right, go ahead, sir.

18 MR. JURGENS: First we are -- it's not New York
19 Hillside, it's NY Hillside, Incorporated.

20 THE COURT: I'm sorry. Thank you.

21 MR. JURGENS: In addition we're not really trying to
22 collect twice. As you know on environmental issues anyone
23 associated with a property during its operating span is
24 obligated with respect towards cleanup of a property. Now, the
25 settlement agreement that's referred to, I am also referring to

1 it now. I don't know if you have it handy, but it is -- it had
2 provided plenty of opportunity for Samson to indicate that they
3 were covering all obligations, or any obligations of W.R.
4 Grace.

5 If you read the agreement it's referring to a Samson
6 Investment Company, collectively Samson. It does not refer to
7 Grace in any way, manner or form, and in fact on the first page
8 of the settlement agreement you will notice that there's
9 another issue regarding another company, Berry Petroleum
10 (indiscernible) as successor for TEORCO, which was another
11 operator on the property.

12 If you read further in the settlement agreement on
13 Page 3 you'll notice that it says, "Whereas Grace Energy
14 Company and W.R. Grace are both presently in bankruptcy was a -
15 - so therefore they're not in this agreement because of the
16 bankruptcy issue." And it goes on to also state that, "Whereas
17 all of the capital stock of Grace was sold to Samson, an
18 unrelated company, and after that time the name of it -- the
19 entity known as Grace Petroleum was ultimately changed to
20 Samson." So, there's no question that Grace was obligated
21 under the agreement.

22 Now, with respect to the position that Samson is now
23 taking, I'm claiming first that they never indicated at this
24 time of the settlement agreement they were ever just sitting in
25 the place of W.R. Grace and Company. And, in fact, if you read

1 the affidavit of the officer of Samson, particularly Paragraph
2 Number -- let me see if I can get this correct -- Number 7,
3 Samson states that December of '01 Samson entered into a
4 settlement agreement and a mutual release paying the 25,000 to
5 NY Hillside.

6 Samson's participation in the settlement agreement
7 was for the purpose of resolving any and all alleged liability
8 of Samson in a Petro suit, including any alleged liability that
9 Samson Investment Company, Samson Hydrocarbons, and now they
10 say NJTC. At no time the settlement issue, and at no time did
11 any of the attorneys at that issue represent the fact that
12 Samson was covering or had any obligation with respect to
13 Grace's activities on the property. Therefore, it clearly said
14 that Samson because of their ownership they decided that they
15 were a party of the agreement and that they were clearing
16 themselves of any liability in connection with this matter.

17 MS. BAER: Your Honor, I don't mean to interrupt, but
18 I think at this point I need to point out that Mr. Jurgens is
19 now testifying. I was sticking fully to the documents. He is
20 now saying and putting in things into evidence theoretically
21 that have nothing to do with any of the documents.

22 THE COURT: All right. Well, I have a -- probably a
23 more preliminary issue. Isn't Ny Hillside a corporation? I
24 don't think the objection to claim has been signed by counsel.
25 And, Mr. Jurgens, are you a lawyer representing Ny Hillside?

1 MR. JURGENS: I am -- at this point NY Hillside is a
2 defunct company. I can't afford --

3 THE COURT: Are you a lawyer, sir?

4 MR. JURGENS: I am not a lawyer, no --

5 THE COURT: Okay. Then we can't --

6 MR. JURGENS: -- therefore I am begging the Court to
7 understand I'm not a lawyer and I don't -- I've never been
8 involved with a bankruptcy before.

9 THE COURT: All right, Mr. Jurgens, we can't go
10 forward. Corporations must appear in bankruptcy by counsel.
11 They cannot be represented by an individual. So, in order to
12 pursue this any further you're going to have to get a counsel
13 for the company. I simply can't --

14 MR. JURGENS: Is this the judge speaking?

15 THE COURT: Yes, I'm the judge. I can't --

16 MR. JURGENS: Okay. I couldn't -- you have to please
17 excuse me. I'm not a lawyer and Ny Hillside is not a
18 corporation anymore. It has no -- in the State of California
19 it's been -- the company's been terminated. I mean, I don't
20 know what the term is, so I don't know how I can get a lawyer.
21 I mean, I can't afford to pay a lawyer to represent me here in
22 this matter.

23 THE COURT: Well, the objection that was filed
24 indicates that NY Hillside is a corporation. It has an Inc.
25 after its name.

1 MR. JURGENS: It was at that time.

2 THE COURT: If it's a defunct --

3 MR. JURGENS: It was at that time, yes.

4 THE COURT: Well, sir, if it's not a corporation now
5 then I'm not sure what claim it has. If there's a successor in
6 interest then that successor in interest has to file the claim.
7 But, in any event, to the extent that it's a corporation you
8 can't represent it. It needs counsel. So, I can't go any
9 further with this objection.

10 I'm going to deny it without prejudice to NY Hillside
11 actually finding counsel if it chooses to do so and come back
12 before this Court. This objection actually should've been
13 stricken by the clerk since it wasn't filed by a lawyer at the
14 outset, but apparently that technicality was overlooked. So, I
15 simply can't go forward with it any longer and I'm going to
16 deny the objection without prejudice for that reason.

17 MS. BAER: Your Honor, I -- technically speaking, we
18 filed an objection to his proof of claims.

19 THE COURT: Claim, I'm sorry. It's the claim.

20 MS. BAER: Are you -- you're disallowing the claim?

21 THE COURT: I'm disallowing the claim but without
22 prejudice to reconsideration in the event that NY Hillside
23 obtains counsel. It has not been filed. The responses have
24 not been filed by a lawyer. That's what I'm trying to get to.

25 MR. JURGENS: Well, can I ask the judge a question?

1 THE COURT: Yes, sir.

2 MR. JURGENS: Now, if I understand this correctly
3 that if I do get a lawyer I can -- what should I do? What
4 should he do?

5 THE COURT: Well, he'll have to advise you, sir. I'm
6 sorry, but I'm not permitted to give you legal advice. But,
7 the -- but one thing he will have to do is file an appropriate
8 pleading with this court. And I'm not suggesting that I am
9 saying that if you do file that pleading it's going to win,
10 okay? I'm not in any way suggesting that. I'm not considering
11 at all on the merits right now because I can't do that without
12 counsel representing the claimant.

13 And you're -- since you're not a lawyer representing
14 a claimant I can't go forward, so I'll have to redo the hearing
15 in the even that NY Hillside has counsel. So, I'll disallow
16 this proof of claim, but again, without prejudice. If the
17 company does, in fact, get counsel they can start this process
18 again and then I'll have the argument on the merits, but I
19 can't do it in this context.

20 MS. BAER: Your Honor, if I might suggest too, we did
21 discover that NY Hillside had been dissolved, but Mr. Jurgens
22 was listed as the party to serve. One thing very unclear and
23 that's whether Mr. Jurgens has any interest in this claim. If
24 he is the successor to or took an assignment of, we have no
25 idea.

1 THE COURT: Well, he'll have to explain all of that
2 in the event that there is counsel who's present because right
3 now the claim's filed by NY Hillside not by an successor, so I
4 don't know those facts either. We'll have to determine that at
5 a later date. If you will submit an order, Ms. Baer, that
6 simply disallows the proof of claim without prejudice to
7 reconsideration in the even that New York -- that NY Hillside
8 gets counsel then I will certainly reconsider in the
9 appropriate circumstances.

10 MS. BAER: Thank you, Your Honor, I'll do that.

11 THE COURT: All right. Thank you.

12 MS. BAER: Your Honor, that takes us to Agenda Item
13 Number 5 which is the motion of the debtors for approval of a
14 settlement with CNA, and I believe Ms. Esayian will address
15 that.

16 THE COURT: Ms. Esayian.

17 MS. ESAYIAN: Good morning, Your Honor. Lisa Esayian
18 for the debtors. And as Ms. Baer said, this is the debtors'
19 motion for approval of our settlement agreement with the CNA
20 Insurance Companies.

21 I'm going to try to be relatively brief so that we
22 allow time for whatever questions Your Honor has regarding this
23 motion and settlement, but some background facts, Grace had a
24 number of different insurance -- liability insurance companies
25 over the years. CNA covered the period 1973 to 1985 for Grace.

1 Also later periods that are not at issue here, but for purposes
2 of this motion CNA was Grace's general liability and workers
3 compensation insurer starting in 1973 and going to at least
4 1985.

5 The motion is a settlement of remaining insurance
6 coverage under three primary policies, each covering a
7 multi-year period, and 16 excess policies, virtually all at
8 high levels and covering various periods from 1973 to '85.
9 Grace and CNA have a very extensive litigation history. Prior
10 to the bankruptcy filing there was an almost 25-year litigation
11 history.

12 Some litigation even continued after the bankruptcy
13 filing. It litigated about coverage under the primary
14 policies, under the excess policies, asbestos claims,
15 environmental claims. It litigated about CNA's obligation,
16 they litigated about Grace's obligations. There were a total
17 of four prepetition partial settlement agreements between Grace
18 and CNA that resolved some issues but not all issues, one
19 post-petition settlement agreement in 2004 that resolved one
20 narrow set of issues.

21 So, coming to the present we still had a number of
22 issues unresolved between Grace and CNA and this settlement
23 agreement attempts to resolve virtually all of them except
24 perhaps coverage under later years that has no bearing on
25 asbestos claims or the trust.

1 The key points of the settlement agreement are that,
2 first of all, the settlement amount to be paid by CNA is a
3 maximum of \$84 million. The settlement provides -- the
4 settlement resolves insurance coverage issues under all
5 policies issued by CNA to Grace that actually or potentially
6 provide coverage for asbestos claims. The settlement agreement
7 also resolves all of Grace's obligations related to such
8 coverage. These again were heavily disputed issues related to
9 retrospective premiums, deductibles and the like.

10 Settlement agreement -- in the settlement agreement
11 CNA also releases rights to make indirect PI trust claims
12 against the asbestos PI trust. CNA also withdraws all of its
13 plan objections, and at this point in time despite various
14 stipulations and whatnot along the way CNA still has a number
15 of pending plan objections, including a number of objections
16 that are unique to CNA and not also brought by other parties.
17 And CNA also withdraws all proofs of claims that it has filed
18 in this case as related to asbestos-related claims. So, the
19 settlement really accomplishes a great deal beyond just a
20 payment of funds to the estate or the trust.

21 As Your Honor is probably aware from the record two
22 objections have been filed, one by the Libby claimants, one by
23 BNSF. I'm not going to go through and attempt to respond to
24 everything they've said in detail as we covered that in our
25 papers, and of course they will speak and hopefully we'll have

1 a chance to address anything new that they say, but I would
2 like to speak to a core point which is a number of objections
3 were raised regarding the channeling -- the asbestos PI
4 channeling injunction and the supposed impact of the settlement
5 agreement on the asbestos PI channel injunction.

6 I think the first key point is that the settlement
7 agreement does not change or alter or modify or affect the PI
8 channeling injunction in any way. The injunction is set forth
9 in the plan. It remains in the plan. It was the subject of
10 much discussion, objections, et cetera during the confirmation
11 hearing. The settlement agreement does not change that
12 language.

13 The only thing that the settlement agreement does
14 that is related to the channeling injunction is that it sets up
15 a mechanism whereby if certain claims in the future are held to
16 being not covered by the channeling injunction, certain claims
17 against CNA, then there is a mechanism for the trust to
18 indemnify CNA for a certain amount of those claims up to \$13
19 million.

20 So, there is no -- in order for Your Honor to approve
21 the settlement it is not necessary for Your Honor to make any
22 findings with respect to the injunction or any changes with
23 respect to the injunction. It simply remains as is.

24 THE COURT: I'm sorry, the mechanism is that if it's
25 determined that the claims against CNA are not related to

1 asbestos claims then the trust is going to indemnify CNA?

2 MS. ESAYIAN: If CNA is -- if the claims are held to
3 be outside the scope of the asbestos PI channeling injunction
4 such that they are not -- CNA is not protected for those
5 claims, then the trust will indemnify CNA up to an amount of
6 \$13 million. This is for a narrow set of claims that has been
7 termed in the Libby complaint's papers as insurer wrongdoing
8 claims, but it's really a narrow set of claims. It's not all
9 claims that would be brought against CNA. It's certain claims
10 that the Libby claimants and perhaps others might bring against
11 CNA.

12 So, for the vast majority of claims that would be
13 brought against CNA that would relate to Libby or asbestos or
14 Grace insurance policies, presumably they would be covered by
15 the channeling injunction. If down the line there is some
16 ruling by this Court or the district court or some other court
17 that some subset of claims is not covered by the channeling
18 injunction then a portion of these settlement funds would be
19 used to indemnify CNA for those claims.

20 THE COURT: All right. Well, I mean you know that
21 the likelihood is that those issues are going to be raised
22 because they've been raised already here in this objection to
23 the settlement. So, really this settlement isn't for 84
24 million, it's for 72 million. So --

25 MS. ESAYIAN: Well, Your Honor, it's for --

1 THE COURT: I mean why is the trust indemnifying CNA
2 for a claim that the trust doesn't have that wouldn't come into
3 the trust?

4 MS. ESAYIAN: Well, the settlement is for a minimum
5 of 71 and a maximum of 84. The claims that are at issue first
6 have to be brought somewhere at some point, they have to be
7 litigated, and then there has to be a determination that
8 they're not covered by the channeling injunction. So, I
9 understand Your Honor's concern that the claims may well be
10 brought because they've already been the subject of some
11 controversy, but there also has to be the determination that
12 they're not covered by the channeling injunction before there's
13 any indemnity obligation.

14 And, quite frankly, Your Honor, this was a way to
15 make this whole package work. (Indiscernible) Grace, and the
16 trust and CNA wanted to find a way to resolve all these
17 complicated disputes among themselves, and rather than doing
18 anything that would require a modification of the injunction or
19 seek to require a modification of the injunction, this is the
20 mechanism that the parties came up with in order to spread the
21 risk if you will.

22 There are some -- if those claims are found not to be
23 channeled and if they are worth more than \$13 million, CNA will
24 be paying for those claims. If they're found to be worth less
25 than \$13 million the trust will be indemnifying for them, and

1 if they're found to be channeled then they're channeled.

2 THE COURT: Well, I understand the outcome. What's
3 the difference between the minimum 71 and maximum 84 million
4 that's to be paid in?

5 MS. ESAYIAN: The settlement agreement requires that
6 in the event that this certain narrow subset of what's been
7 termed insurer wrongdoing claims are not channeled the trust
8 will indemnify CNA for settlements or judgments that CNA may
9 have to pay for such claims.

10 So, it's not only that the claims are found not to be
11 channeled, but also there have to -- CNA has to either end up
12 having a judgment against it or end up paying a settlement of
13 those claims. So, there's a number of hurdles that any
14 claimant pursuing one of those claims against CNA would have to
15 get past before there would be any obligation for the trust to
16 compensate CNA.

17 THE COURT: So, the minimum is assuming that the
18 trust is honoring an indemnity and the maximum is assuming that
19 the trust is not honoring an indemnity?

20 MS. ESAYIAN: I'm sorry, Your Honor. Maybe I said
21 something confusing. I'm not following.

22 THE COURT: The minimum that CNA has to put in you
23 said is 71 million --

24 MS. ESAYIAN: Yes.

25 THE COURT: -- and the maximum is 84.

1 MS. ESAYIAN: Yes.

2 THE COURT: What's the delta? What's in the middle?

3 MS. ESAYIAN: If there are no claims, if this
4 category of so-called insurer wrongdoing claims, if there are
5 no such claims found to be valid against CNA, if no such claims
6 ripen to judgments or settlements against CNA, then CNA will
7 pay the maximum of 84 million.

8 THE COURT: All right. So, this -- the minimum, the
9 71 million assumes that the indemnity obligation is honored by
10 the trust.

11 MS. ESAYIAN: Honored to the full amount of 13
12 million --

13 THE COURT: All right.

14 MS. ESAYIAN: -- that's correct. And then, of
15 course, there's the possible middle ground which is maybe
16 there's a handful of settlements that CNA has to pay. They
17 don't total 13 million and so the settlement amount could end
18 up being in between 71 million and 84 million.

19 THE COURT: Okay.

20 MS. ESAYIAN: Sticking with these issues regarding
21 the injunction, to the extent that the objections of the Libby
22 claimants and some of the objections of BNSF relate to issues
23 about the scope of the injunction or the application of the
24 injunction, it's the -- it's certainly the debtors' position
25 that those issues are not properly taken up on this motion for

1 approval of a settlement.

2 The injunction issues were dealt with on a
3 confirmation proceeding. Issues about scope, et cetera, were
4 heavily litigated, and the settlement agreement doesn't require
5 any redetermination of those issues, and those issues should
6 not be reopened at this time.

7 Regarding the factors then for judging the
8 settlement, the factors really are the four-part test set out
9 by the Third Circuit in In re Martin. It's really a
10 reasonableness determination, and we would submit that the
11 affidavit that CNA has submitted, it's the affidavit of their
12 representative Daniel Caswell (phonetic) recites a number of
13 reasons why this is a very reasonable settlement in the sense
14 that there are a large number of insurance coverage defenses
15 that CNA would intend to litigate and has litigated over the
16 years as to this coverage, and were they successful on any one
17 of those issues the coverage might be entirely eviscerated let
18 alone if they were successful on all of them.

19 So, from the debtors' perspective achieving a
20 settlement of either 71 million or 84 million is a very
21 substantial amount of funds considering all the issues that CNA
22 would be likely to inject along the way in litigation. There
23 are other issues that are raised by the objections that we
24 dealt with in our papers that I'm inclined to just put aside
25 for now and see the extent to which the objectors raise them

1 again or new ways and then come back on reply.

2 THE COURT: All right.

3 MS. ESAYIAN: Thank you, Your Honor.

4 THE COURT: Mr. Glosband?

5 MR. GIANNOTTO: Giannotto.

6 THE COURT: Oh, I'm sorry. I apologize.

7 MR. GIANNOTTO: Your Honor, Michael Giannotto for the
8 CNA companies. I, like Ms. Esayian, just want to say a few
9 words and then wait to hear what Libby and BNSF say, but I do
10 want to clear a point of possible confusion.

11 When we settle, this settlement agreement settles all
12 asbestos claims in the broadest sense that asbestos claims
13 could be used between CNA and Grace. We wanted to between
14 ourselves settle all of that. For instance -- and that would
15 include everything that's an asbestos PI claim under the plan,
16 as well as possibly things that aren't asbestos PI claims under
17 the plan that would be enjoined but that relate to asbestos.

18 And so, part of the issue was that CNA, if we were
19 sued on a claim that wasn't an asbestos PI claim we would have
20 an indirect -- or on claims, we would have indirect PI trust
21 claims against the trust, but we settled that as part of this
22 agreement. So, we knew there was this amorphous category of
23 Libby wrongdoer claims, what they call wrongdoer claims.

24 Now, there are other claims that might be out there,
25 but between us and Grace everything asbestos is settled. And

1 we give up our indirect PI trust claims based on things that
2 are asbestos. Now, in return there's this partial indemnity of
3 up to \$13 million. It's not aimed just at Libby or anything
4 else. It's aimed at if we are liable -- if you went to the
5 asbestos PI injunction and there is an asbestos-type claim
6 we've settled with Grace that doesn't fall within the
7 injunctions if someone were to recover from us, then we'd get a
8 partial indemnity back from Grace. That's all it was meant to
9 do.

10 The release doesn't bind Libby of all asbestos
11 claims. So, if -- we've settled everything with Grace, we've
12 given up our indirect PI trust claims, we're going to pay the
13 \$84 million, but if something slips through the cracks and
14 we've given up indirect PI trust claim on it we get back, you
15 know, up to \$13 million.

16 The other thing I just want to emphasize is that this
17 settlement took a long time to negotiate. There's been a lot
18 of litigation between the parties over the years. We sat -- we
19 negotiated for over a year. You know, the representatives of
20 the FCR and Grace and the ACC are experienced lawyers. They're
21 not going to sell anybody short on these policies.

22 One of the things we emphasize in our papers because
23 the Libby claimants seem to believe that on the non-product
24 coverage on the primary policies, they can basically walk in
25 and get 100 cents on the dollar for their claims, and it's just

1 not true. It's just not true. There are a lot of exclusions
2 in those policies that'll apply to a lot of Libby people as we
3 set out on our paper; employee exclusions, pollution
4 exclusions, Grace's failure to give notice, expected or
5 intended injury.

6 In addition a lot of their claims may fall within the
7 already settled and aggregated products coverage, and also we
8 will argue in commerce litigation that all the Libby claims
9 constitute one occurrence for which there is a limit under the
10 policy.

11 And so, they're not going to be able to just waltz in
12 and get money. And what their -- their basic position is that
13 they don't like the settlement that's been reached and they
14 want to be able to veto it. They claim it doesn't affect the
15 estate at all because it's just sort of money to them, but it
16 does affect the estate because if this settlement doesn't go
17 through and in effect the trust or Libby is forced to litigate
18 this coverage and they don't win anything or they don't get
19 very much then the trust has suffered because the trust has
20 lost these settlement proceeds and it'll still have to pay the
21 Libby claimants on their claims.

22 So, there is an affect on the trust. What their
23 basic complaint is, is they don't want these policies sent to
24 the trust and that is a confirmation issue. But, if they've
25 gone to the trust then the trust is in the position, or here

1 the ACC and FCR and Grace are in a position to determine what a
2 good settlement is. And they've determined what a good
3 settlement is given these defenses.

4 And, again, the consideration is not just the \$84
5 million. We're given up indirect PI trust claims. We're
6 withdrawing our objections. We're giving up indemnities we
7 have under prior settlement agreements we've reached with
8 Grace. We're giving up those indemnities. We're giving up our
9 proof of claim. We're not going to require exhaustion before
10 all those very, very, very, very, very high level policies are
11 reached. They'll be able to get the money, you know, once the
12 plan is confirmed and it's a final order they'll get the money
13 right away.

14 So, there's a lot of consideration going to them.
15 There is a lot of problems with recovery on these non-products
16 claims for the Libby people. There's a problem of exhaustion
17 on the upper level policies, and this is a good settlement.
18 It's a good settlement; \$71 million, \$84 million, and it
19 resolves everything asbestos between Grace, the trust and CNA,
20 not just asbestos PI claims. But, it doesn't change the
21 channeling injunction. The channeling injunction would be for
22 asbestos PI claims as the plan provides in Section 8.2, and
23 that's what it will remain.

24 THE COURT: All right. What about the workers comp
25 issues? CNA had some objections to the plan I think based on

1 its alleged creditor status as an employee -- providing
2 insurance to employees on coverage, not just on the asbestos
3 issues. Are those objections to the plan also, I guess,
4 withdrawn if the settlement's approved?

5 MR. GIANNOTTO: My understanding, Your Honor, is that
6 there's a -- and maybe Ms. Baer can speak to this. There's a
7 proof of claim out there for certain money on retros on workers
8 comp policies, and that's carved out of this settlement
9 agreement, but I believe we're close to agreement on that.
10 There's a different attorney handling that for CNA, but I
11 believe we're basically close to agreement on that, aren't we?

12 MS. BAER: Your Honor, that's correct. And that was
13 not a plan objection. There was a note at one point in time
14 about clarification as to whether workers comp was affected and
15 that was clarified. It was not affected. This settlement
16 doesn't affect it, the plan doesn't affect it. The workers
17 comp insurance is still current and we are, in fact,
18 negotiating with CNA to resolve the dollars involved and who
19 owes who what.

20 THE COURT: So, there were no objections to the plan
21 based on -- I thought I was just looking at --

22 MS. BAER: Again, CNA raised an objection. It was
23 more of a clarification as to whether or not the plan affected
24 workers comp claims and it did not.

25 THE COURT: Okay. And CNA agrees?

1 MS. BAER: Yes.

2 THE COURT: So, for my purposes in trying to get this
3 order done, everything I'm working on on the CNA issues I don't
4 have to work on anymore, is that what you're telling me?

5 MS. BAER: If this settlement is approved, yes.

6 MR. GIANNOTTO: Once you approve the settlement, yes,
7 Your Honor.

8 THE COURT: If the settlement's approved, yes.

9 MR. GIANNOTTO: They all go away.

10 THE COURT: Okay.

11 MR. GIANNOTTO: Okay.

12 THE COURT: I just need that clarification because I
13 really would like to get this opinion done some time soon. So,
14 with the changing landscape it sometimes gets a little
15 difficult to know what I should be and shouldn't be addressing
16 here, so --

17 MR. GIANNOTTO: If you don't have any other questions
18 I'll just -- maybe Libby and BNSF can speak and we can come
19 back up and address their concerns.

20 THE COURT: All right.

21 MR. GIANNOTTO: Thank you.

22 THE COURT: Thank you.

23 MR. COHN: Your Honor, I don't know whether maybe you
24 want to hear from anybody else speaking in support of this
25 settlement before you hear from us.

1 THE COURT: Anyone else wish to be heard in support?

2 MR. LOCKWOOD: Your Honor, just for the record, the
3 ACC supports the settlement. I don't think we have anything to
4 add to what's been said so far. We'll reserve any comments
5 until we hear what the Libby claimants and BNSF have to say.

6 THE COURT: All right. Mr. Frankel?

7 MR. FRANKEL: Yes, Your Honor. We filed a joinder in
8 support of settlement also.

9 THE COURT: Anyone else? Okay. Mr. Cohn?

10 MR. COHN: Good morning again, Your Honor.

11 THE COURT: Good morning.

12 MR. COHN: And I'm sorry to see you're not feeling
13 well.

14 THE COURT: Oh, I feel fine, thanks. My daughter is
15 visiting with her cat. Much as I love the cat it's causing me
16 some problems, so I apologize that I'm sitting up here
17 sniffing, but that's the issue, so sorry.

18 MR. COHN: Oh, okay. Well, let's start off with the
19 easy part, Your Honor, which is one of the issues that we did
20 raise in our objection was that we thought that the scope of
21 the release was unclear, a separate issue from the injunction.
22 And the debtors very graciously said that they were okay with
23 including the language that we proposed in our brief. So,
24 that's on Page 36 of our objection, and I would ask that if the
25 CNA settlement were to be approved that that language be added

1 to the order.

2 THE COURT: On Page 36 of your objection to the plan?

3 MR. COHN: No, 36 of our --

4 THE COURT: To the settlement.

5 MR. COHN: -- objection to this settlement.

6 THE COURT: Okay.

7 MR. COHN: Yes. So, our objection -- the three main
8 points of our objection are as follows, Your Honor. The first
9 is -- concerns our right to proceeds of the CNA non-products
10 coverage. Now, when you talk about rights of claimants to
11 proceeds of liability insurance coverage there are two almost
12 parallel universes out there among the cases.

13 On the one hand you have the garden variety cases,
14 I'm sure you've had many of your own where a claimant comes in
15 in the non-mass tort context, claimant comes in, says I'd like
16 relief from the stay to pursue the debtors' insurance coverage,
17 and that is routinely granted and the claimant goes off and
18 either succeeds or doesn't succeed in getting paid by the
19 insurance company, but certainly nobody thinks to object that
20 those proceeds would be property of the bankruptcy estate if
21 the claimant were able to realize them from the insurer.

22 And then on the other hand you have the other, you
23 know, parallel universe, is that in the mass tort context is
24 routinely often without discussion of this particular issue the
25 proceeds of liability insurance are taken into the bankruptcy

1 estate and they are administered through a trust for the
2 benefit of personal injury claimants as a whole.

3 And there is very little explanation in the case law.
4 These universes kind of exist side by side, but there's very
5 little explanation as to how you define whether any particular
6 insurance or coverage situation fits into one universe or the
7 other. However, there is a guiding light on that subject, Your
8 Honor, and that is the Edgeworth decision in the Fifth Circuit
9 where the Court did try to explain why it is that in the normal
10 situation insurance proceeds or proceeds of liability coverage
11 are not property of the estate, but why in the mass tort
12 context it is permissible to administer them through the
13 bankruptcy estate.

14 And what the Fifth Circuit explains Edgeworth is,
15 it's a matter of what they labeled secondary impact. Secondary
16 impact means that in some situations in the mass tort context
17 there will not be enough insurance coverage to go around. And
18 the secondary impact consists of the problem of the race to the
19 courthouse, the need to order -- to have an orderly and fair
20 and ratable administration of those proceeds so that everyone
21 gets their fair share.

22 And that it will justify, Your Honor, the inclusion
23 of proceeds of insurance where there are aggregate limits on
24 the policies such that we know that there's just not enough
25 insurance to go around. The way that products coverage has

1 been written historically, Your Honor, is that it's written
2 subject to aggregate coverage -- aggregate limits, I'm sorry,
3 Your Honor. That's why you have all these excess policies
4 because you're going to go through the primary coverage when
5 you reach the aggregate limit of coverage and then you're going
6 to go up through layer after layer after layer of excess
7 coverage.

8 And even with all those layers in the typical
9 asbestos case there's not enough insurance to go around. And
10 here it's undisputed. There is not enough products coverage to
11 go around, and the Libby claimants, more to my knowledge than
12 anybody else, disputes that products coverage can be
13 administered through the asbestos PI trust.

14 So, the issue that we're raising here is really a
15 narrow one, and that is, well, how about the non-products
16 coverage. Libby claimants assert that we have claims for
17 non-products coverage. Non-products coverage historically and
18 in this particular instance, Your Honor, gets written without
19 aggregate limits.

20 And under those circumstances the secondary impact
21 identified by Edgeworth and discussed by Judge Gross in the
22 Santa Fe Minerals case does not exist. And we would
23 respectfully submit that there is, therefore, no justification
24 to take those proceeds and administer them as an asset of the
25 bankruptcy estate.

1 So, the Libby -- now there had been a number of
2 comments that had been raised in response to this. Most of
3 them, Your Honor, really have nothing to do with the issue at
4 hand. Mr. Giannotto said today, and of course CNA points out
5 in its papers, that there are many, many coverage defenses that
6 CNA would assert to the non-products coverage. Well, that's
7 true of all insurance companies. They always assert coverage
8 defenses.

9 I don't think I've ever seen an insurance company
10 just arrive and just say, oh, yes, we'll cheerfully, you know,
11 pay this claim. But, that doesn't -- the fact that we might or
12 might not be successful in obtaining this non-products coverage
13 doesn't make it property of the estate. This is not a factor.
14 It doesn't have an affect on the bankruptcy estate. It is not
15 a secondary impact in the words of the Fifth Circuit.

16 The other thing that we've heard -- you've heard said
17 is that there are retroactive premiums and deductibles and all
18 of this kind of stuff that will result from pursuit, or could
19 conceivably result from the Libby claimants pursuit of
20 non-products coverage. And once again that's not a secondary
21 impact. That's not something that the -- that any Court has
22 said a reason why these amounts can be included as an asset of
23 the bankruptcy estate because, Your Honor, as you know there
24 are many situations in which people will come back against the
25 asbestos PI trust based on claims that are pursued by one third

1 party against another.

2 To take this particular situation for example, Libby
3 claimants, if they recover from the State of Montana for
4 example, the State of Montana will surely come back against the
5 asbestos PI trust and those claims will just get resolved
6 through the mechanisms of the trust, but they are not -- the
7 existence of those is certainly not a reason to say, oh, the
8 proceeds of whatever the Libby claimants are able to recover
9 from the State of Montana are an asset of the bankruptcy
10 estate. That's just not the way that it works.

11 So, the one thing that we've heard that would
12 constitute a secondary impact was, you noticed Mr. Giannotto
13 referred to CNA's position that the Libby claimants' exposure
14 to asbestos was a single occurrence. And if it were a single
15 occurrence, Your Honor, the affect of that is -- there are per
16 occurrence limits under the policies, and the affect of that
17 would be that there would not be enough insurance to go around
18 for all the Libby claimants.

19 The problem with Mr. Giannotto's position is that it
20 is contrary -- directly contrary to New York law which is what
21 CNA says applies here. You have a decision of the New York
22 Court of Appeals which is the highest court in the State of New
23 York, the Appalachian Insurance Company v. General Electric
24 case at 8 N.Y. 3rd 162, a 2007 decision directly on point. So,
25 Your Honor, in order to find that there's a secondary impact in

1 this case you would need to really overrule the New York Court
2 of Appeals on this issue of insurance law.

3 So, we would respectfully submit there is no
4 secondary impact on the Grace bankruptcy estate from the Libby
5 claimants' pursuit of their non-products coverage, and
6 accordingly those proceeds may not be administered to the
7 bankruptcy estate and we simply must be allowed to pursue those
8 outside bankruptcy. And for this reason, because the
9 settlement purports to be a settlement that will cover
10 non-products coverage as well as products coverage, for that
11 reason, Your Honor, the settlement cannot be approved.

12 Now, another objection that the Libby claimants have
13 to the sale is that the Section 524(g) injunction is not fair
14 and equitable as it relates to this particular settlement. And
15 at this point, Your Honor, I should pause and address the point
16 that's been made by the plan proponents and by CNA that the
17 524(g) injunction is somehow not to be discussed in the context
18 of this objection. Well, Your Honor, of course it's to be
19 discussed.

20 The settlement by its terms makes CNA a settled
21 asbestos insurance company which under the terms of the plan
22 would entitle it to the Section 524(g) injunction. One of the
23 requirements of the 524(g) injunction is that you have to
24 determine that the injunction is fair and equitable as it
25 relates to the particular beneficiary of the injunction, here

1 CNA.

2 The CNA settlement did not exist at the time that
3 objections were filed and litigated to plan confirmation. We
4 had never had the chance to address whether the 524(g)
5 injunction would be fair and equitable as it relates to CNA, so
6 this is the proper time to address the Section 524(g)
7 injunction. And we are certainly not precluded from doing so
8 by the fact, which everybody agrees upon, Your Honor -- you
9 know the plan proponents said that we did raise the scope of
10 the 524(g) injunction in opposition to confirmation of the plan
11 and we litigated it at that time, and I agree, we did, but we
12 could also litigate it here in the specific context of the CNA
13 settlement.

14 And so, on the issue of the fair and equitable
15 standard, Your Honor, the first problem is that under the case
16 law interpreting fair and equitable one thing that -- nobody
17 says comprehensively what fair and equitable means, but one
18 requirement that courts have said is certainly part of the fair
19 and equitable standard is that what the insurer contributes
20 should be proportional to what could be collected from the
21 insurance company outside of a bankruptcy.

22 Now, apart from a whole bunch of -- a litany, really,
23 of the fact that CNA has litigated heavily for 25 years, CNA
24 raises all these coverage defenses, we've certainly heard a lot
25 about the difficulties that would be faced by someone in trying

1 to recover what they're entitled to under the insurance
2 policies. But, what we have not heard, and nothing appears in
3 the record, is, okay, but what is it that would be recovered if
4 the claims were successful?

5 I didn't really even see figures on that, Your Honor,
6 for the products coverage, but we certainly don't see it for
7 the non-products coverage. There's no attempt to say, well,
8 yes, if we succeeded we would get this amount, but we've only
9 got a -- and, you know, whatever it is, you know, 80 percent
10 chance, 50 percent chance, whatever the plan proponents believe
11 to be the case. But, since we only have a fractional chance of
12 recovering on that, therefore the settlement is appropriate.
13 We see none of that kind of specificity that you would need,
14 Your Honor, to make a determination that what CNA is
15 contributing is truly proportional to what its liability would
16 be outside bankruptcy.

17 THE COURT: Well, if it's taking 25 years to get to
18 this point and a court hasn't determined what that proportional
19 share of liability is, how can one use a proportional share?
20 It seems to me that that's -- that a factor to be considered
21 may be that, but the risks of recovery seem to be pretty high.
22 The parties have been at it for a very long time without
23 rulings that would determine what that liability may be, and it
24 seems to me that risk of litigation in the settlement side of
25 things is one primary factor the Court looks to.

1 And as to the fair and equitable side, the fact that
2 the amounts may not be known and that the risk is pretty
3 extreme either way is also a reason to adjudicate a fair and
4 equitable. As to the raw dollars I agree. I don't know what
5 the debtor's position is with respect to what the maximum
6 amount assuming that it could -- it won on everything could be.
7 I don't have that number.

8 MR. COHN: Well, and here's the problem, Your Honor.
9 If the plan proponents were standing here and telling you that
10 obviously Mr. Giannotto is not to be believed, not because he's
11 not a wonderful person which he is, but because he's the
12 adverse party to the estate, so when he says it's a wonderful
13 settlement, you know, we all kind of take that with a grain of
14 salt.

15 When the plan proponents stand up here and tell you
16 that 84 million, or maybe it's really 71 million, you know, is
17 a good number, well how do you know -- if they stood up here
18 and said, well, Your Honor, ten million is a great settlement,
19 or if they came in and said, you know, 200 million is a great
20 settlement, I mean how do you know? And the answer is they
21 have given you no -- they haven't given you enough specificity
22 for you even to know whether they're in the ball park. And I
23 would respectfully submit that the record here is just
24 completely inadequate, especially on the issue of non-products
25 coverage.

1 On the issue of non-products coverage, Your Honor,
2 where the starting point is the total amount of Libby claims,
3 and I agree it's only a starting point, Your Honor. If we were
4 settling this -- if we were pursuing this outside bankruptcy,
5 if we step back for a second, Your Honor, and say, okay, what
6 happens if you say, okay, I agree with you, Mr. Cohn, the
7 non-products coverage is yours, you go pursue it outside
8 bankruptcy. Well, we all know what the likely result is. The
9 likely result is we would do a settlement with CNA. And the
10 one thing that that settlement would not consist of, it would
11 be recovering 100 cents on the dollar on Libby claims which is
12 not the way that it works.

13 So, we all understand that there is to be some kind
14 of a discount factor implied, but you've got to start off with
15 a starting point which would be the entire, you know, the
16 entire amount that the estate would recover or in this case the
17 Libby claimants would recover if successful, and then you do a
18 discount based on the fact that CNA asserts coverage defenses,
19 and you have none of that in this record.

20 Another aspect of the settlement that -- completely
21 apart from that makes this not fair and equitable as to the
22 Libby claimants is the fact that the settlement proceeds are
23 diverted to the asbestos -- the body of asbestos claimants as a
24 whole. One thing that we know is that there is some amount of
25 this -- of any settlement that you would need to attribute to

1 non-products coverage. Non-products coverage is purportedly
2 being settled under this settlement, and yet it's all getting
3 thrown together in one batch.

4 And the case law is very clear that even where the
5 bankruptcy estate can settle claims and can administer the
6 proceeds that those proceeds are to be distributed to those
7 claimants who are the beneficiaries of the coverage that's
8 being settled. Now, I realize that when they -- you know, when
9 they kind of muddle everything together and say, well, we're
10 settling products coverage as well as non-products coverage it
11 may be hard to segregate. And indeed in the process of
12 negotiating this settlement may be hard to segregate the one
13 from the other.

14 But, surely, Your Honor, if they, you know, instead
15 of doing a total of five previous settlements, if there had
16 been a sixth one which had gotten rid of the rest of this
17 products coverage and we were solely left with unsettled
18 coverage being the non-products coverage, and they stood up
19 here and said we're settling for 84, 71 or 60, or whatever the
20 number would be, we're settling the non-products coverage,
21 non-products coverage alone, and that's all that's left, surely
22 what you would do is you would -- is -- you would need to under
23 applicable law, you would need to provide for that -- whatever
24 proceeds they were to be distributed to the holders of
25 non-products claims which in this case for a small minority who

1 actually have better insurance rights than the rest of the
2 group because they're not capped by these aggregate limits, and
3 whatever all these coverage defenses are that CNA has, the one
4 starting point that they do not have is to say our starting
5 point is there's an aggregate limit and we're going to count
6 down from there.

7 Here the starting point is, there's a claim, and the
8 full amount of the claim is payable subject to some discount to
9 take account of coverage defenses. So, the non-products
10 claimants' position is stronger, Your Honor, and they are
11 entitled to a separate allocation of proceeds if indeed it is
12 permissible to take their rights away at all which we say it is
13 not.

14 Our next point, Your Honor, has to do with clarifying
15 the injunction. And to just be very clear, the argument that I
16 just made about the fair and equitable standard had to do with
17 settling the non-products coverage. I'm now turning to what
18 our brief calls the insurer wrongdoing claims. These are
19 claims against CNA based on its own alleged misconduct as
20 distinct from its insurance obligations to ensure claims of the
21 -- against claims that are liability to the debtor.

22 Now, on this issue I need to start off by noting that
23 the plan proponents have acknowledged that the injunction is
24 ambiguous about whether it covers these insurer wrongdoing
25 claims or not, and that may -- I'm not going to comment, Your

1 Honor, on whether that's a reasonable position for the plan
2 proponents to take. They may have strategy reasons why that
3 makes a lot of sense as a position for them to take, but as a
4 preliminary matter, Your Honor, I do want to make it clear that
5 a court has separate obligations when it comes to the entry of
6 injunctions.

7 Both the rules and the case law are clear that a
8 court has an obligation to be clear when it's entering an
9 injunction. The parties are entitled to know what the
10 injunction permits and what it forbids. They are not supposed
11 to discover when they go to litigate, in this case when the
12 Libby claimants where to go and sue CNA, you know, three years
13 from now, we're entitled to know whether that places us in
14 contempt of court and we're entitled to know by the very terms
15 of the injunction.

16 So, to build in a deliberate ambiguity into the
17 injunction, to let it rest upon some future determination of
18 this Court what the injunction covers or does not cover, would
19 be contrary to this Court's duties exercising the federal
20 injunctive power.

21 Now, the court of appeal's jurisprudence on the issue
22 of what a 524(g) injunction can cover has drawn a very clear
23 distinction between derivative liability on the one hand and
24 the liability for a party's own misconduct, what I sometimes
25 have called in this case independent claims or independent

1 liability. The court in Combustion Engineering has said that a
2 Section 524(g) injunction can apply only to derivative
3 liability, the liability of an insurer in this case for claims
4 against Grace, not for the insurer's own liability.

5 THE COURT: I agree with that, Mr. Cohn. There is no
6 way that I'm going to be granting any injunction that covers
7 independent liability not derivative of the debtor. Whether
8 something is derivative of the debtor, however, isn't at this
9 stage something that I can adjudicate. That may be an issue
10 for a coverage court. But, I agree that to the extent the
11 liability is determined not to be derivative it won't be
12 channeled. I agree.

13 MR. COHN: Then all we need to do is to clarify that,
14 Your Honor, and we have -- if you were to direct right now to
15 the parties to include the clarification that you just said I
16 believe I could agree on language with CNA's counsel and the
17 debtors' counsel to include that clarification and then this
18 objection would go away. On this issue there would be removed
19 any jeopardy of reversal on appeal and we would be passed the
20 whole thing. All you need to do is to tell the parties get me
21 language that says only derivative claims are covered.

22 THE COURT: Well, whether you get me language or not
23 the order's going to say if the plan's confirmed that only
24 derivative claims are covered.

25 MR. COHN: Okay.

1 THE COURT: So, I mean if you can give me language
2 that'd be great, but whether it's in -- if -- whether you give
3 me language or not the order's going to say that because I
4 think the circuit's been very clear.

5 MR. COHN: Well, terrific. Then, in that case, Your
6 Honor, I shall move on. And, really, I think I have nothing to
7 move on to. I do -- I think that to the extent that there are
8 specific problems that -- or issues that get raised in the
9 replies which, you know, my -- the proponents have decided to
10 wait and make specific comments only in response to my
11 argument. I would ask, Your Honor, that if it's useful to the
12 Court that I be permitted a short time to rebut what it is they
13 say. Thank you, Your Honor.

14 THE COURT: Ms. Casey?

15 MS. CASEY: Good morning, Your Honor.

16 THE COURT: Good morning.

17 MS. CASEY: CNA wears three separate hats and is
18 seeking protection presumably on all three of those hats. The
19 first one is as an insurer of BNSF. Attached to the objection
20 filed by BNSF were two copies of insurance policies that BNSF
21 asserts are separate policies that specifically name BNSF as
22 the insured, do not include Grace as the insured, and cover
23 BNSF for activities located at the Libby mine -- the BNSF
24 property located at the Libby mine, owners and contractors
25 insurance. We also included a confirmation for a third policy

1 that we have not been able to locate, but that confirmation
2 also demonstrates that it is BNSF that is the named insured.

3 In our objection we raised that there is ambiguity
4 with regard to whether the subject policies that are being
5 compromised under the settlement agreement include the BNSF
6 policies. In the -- both the debtors' and the CNA's response
7 they offered to amend it to clarify that these three specific
8 policies with the policy numbers identified by BNSF would not
9 be covered by the settlement agreement. BNSF hasn't seen that
10 language, but is certainly appreciative of that language and
11 thinks that that resolves it in part.

12 The other claim, however, is that they now are going
13 to add to Exhibit 5 to the joint plan of reorganization the
14 policies that CNA is now entitled to full protection under.
15 And there are ambiguities created by this strange numbering of
16 the policies. BNSF's policy number, 2483440, which names BNSF
17 as the named insured under an owner's and contractor's policy
18 is the same policy number as a policy issued to Grace, Policy
19 Number 2483440, that is Grace's primary general liability
20 policy.

21 The Exhibit 5 is now being amended to state that
22 Policy 2483440 is settled and is entitled to complete
23 protection under the asbestos PI channeling injunction. Not
24 only does the settlement agreement need to be revised, but the
25 potential change to Exhibit 5 to the plan needs to be revised

1 to clarify that the confirmation order and the plan will not
2 independently strip BNSF of its rights under its policy,
3 2483440.

4 THE COURT: All right. I agree, but it seems to me
5 that can't some identification in Exhibit 5 simply indicate
6 that this is the policy issued to Grace, not the one issued
7 where BNSF is named?

8 MS. CASEY: It should be, and that's what we're
9 asking. That's what we're seeking.

10 THE COURT: Fine. I don't -- yes, just take care of
11 that, please, plan proponents.

12 MS. CASEY: Okay.

13 THE COURT: Okay.

14 MS. CASEY: The second hat that CNA is wearing is as
15 Grace's insurers. BNSF as Your Honor is aware through the
16 pleadings has asserted that through the contractual indemnity
17 endorsement BNSF is an additional insured that has rights that
18 cannot be compromised through Grace. BNSF will not -- I will
19 not go through the legal argument right now. We'll rest on the
20 papers. The reply back was that BNSF has already agreed to
21 release these claims through the modification to the plan, and
22 I just want to point out that that is not correct.

23 The plan at the time that BNSF agreed to language
24 that resulted in the withdraw of its objections to the plan
25 relating to the Grace policies, CNA was only a partially

1 settled asbestos insurance policy and it was only settled as to
2 products coverage. So, therefore, the language that was added
3 to the plan at the time that BNSF was carved out of the
4 channeling injunction to be able to pursue its claims as an
5 additional insured under an insurance policy or part of a
6 policy that hadn't been identified under Exhibit 5.

7 It's now being identified under Exhibit 5 as the full
8 policy, and therefore it's changing that plan. So, BNSF's
9 objection to the elimination of its rights as an additional
10 insured under the Grace policies is now at issue. It is not
11 resolved by the previous language. As to the merits of that I
12 will rest on the papers. The third hat that BNSF --

13 THE COURT: So -- pardon me.

14 MS. CASEY: Yes.

15 THE COURT: So, a resolution to that issue -- because
16 I think the debtor contests whether BNSF was, in fact, an
17 additional insured because at least the policies that I've --
18 the couple that I've looked at, I haven't even tried to look at
19 all of the exhibits, don't indicate that BNSF is a named
20 insured. So, to the extent that BNSF contends that it is
21 included as an insured and the debtor disagrees, you are saying
22 you simply want to preserve that issue for some other court to
23 determine?

24 MS. CASEY: No, no. I'm saying that we -- as our
25 papers have pointed out is their -- the legal argument is that

1 under the law of Montana as an additional insured for the
2 contractual indemnity BNSF has rights to defense coverage and
3 to defense costs, and that those defense costs do not go
4 towards the policy limit.

5 There is no -- they're unlimited. It does not -- it
6 is not counted towards the policy limits, and therefore BNSF
7 has this right to receive the defense costs under the
8 contractual indemnity as an additional insured that cannot be
9 compromised to the settlement agreement. BNSF's position is
10 that that is right for this Court to determine and has asserted
11 that objection. And the arguments are set forth in the papers,
12 both the debtors' position and BNSF's positions as to their
13 right to -- their right as an additional insured to those
14 defense costs. It cannot be compromised by the settlement.

15 THE COURT: But, I don't know that there are rights
16 to defense costs. I haven't seen BNSF as a named insured on
17 any of these policies, and again, I haven't even tried to look
18 at all of them.

19 MS. CASEY: And, Your Honor, to be clear, BNSF is not
20 asserting that it is expressly named in the CNA policies.
21 There is, however, an endorsement to the policies that provides
22 insurance to Grace for contractual indemnities that Grace has
23 undertaken to BNSF. So, it is a Grace policy. The argument is
24 that under the law of the State of Montana that creates a
25 relationship as an additional insured that they have -- that

1 BNSF has rights to seek defense costs from CNA.

2 THE COURT: This is clearly a coverage issue. This
3 is absolutely not something that this Court needs to determine
4 to determine if this settlement is appropriate. It seems to me
5 that to the extent that there is some liability of CNA directly
6 to BNSF then some coverage court's going to determine that.

7 I'm not going to determine that, not unless you want
8 to go to an evidentiary hearing as to whether you're a named
9 insured. If you want me to make that determination that -- not
10 named insured, pardon me, an additional insured under the
11 policy then I guess we have to tee that issue up. But, I don't
12 see how that affects CNA's settlement with Grace as to whatever
13 its obligations are to Grace which is what's --

14 MS. CASEY: And that's -- well, the question then is
15 whether the channeling injunction would then prevent BNSF as an
16 additional insured from pursuing those claims, and that is
17 exactly what BNSF's position is, that Grace cannot compromise
18 BNSF's rights as an additional insured, and that is a coverage
19 issue. They can defend that we're not, in fact, an additional
20 insured at the appropriate forum. The question is whether they
21 can get the protection under the channeling injunction to
22 prevent BNSF from asserting that status in a coverage
23 litigation.

24 THE COURT: Well, I suppose if the channeling
25 injunction's brought enough to cover that issue because you're

1 not a -- your client is not a named insured it probably can
2 prohibit that type of activity when what you're doing is
3 essentially saying that the claim is derivative of Grace's
4 insurance.

5 I'm having some difficulty understanding how BNSF is
6 an additional insured when it's not named. It wasn't a
7 subsidiary or an employee. It had a contract relationship with
8 Grace, but that doesn't give your client an insurance
9 obligation under the policies when it's not named and not
10 included. The couple I've looked at, I don't see how BNSF has
11 that claim.

12 So, if I need to make that determination without an
13 evidentiary hearing I have a little bit of difficulty seeing
14 BNSF's position on that issue simply because I don't see that
15 it's documented anywhere. Now, there are some policies on
16 which BNSF is named, and clearly you do have rights under those
17 policies and this discussion has nothing to do with policies in
18 which BNSF is named. But, as to those in which it isn't named
19 I'm -- the policies don't seem to be broad enough to cover BNSF
20 as a contractor who's dealing with Grace.

21 There may be others out there in which the policy
22 coverage is broader, but at the moment I don't know where they
23 are. So, if we need a hearing on that score, if it's going to
24 come here then it has to be teed up in a different way than
25 what I've been able to see through the plan confirmation

1 process.

2 MS. CASEY: Again, BNSF has objected to the
3 compromise of those claims based on a state law rights under
4 those policies, and that is BNSF's position. The third hat
5 that CNA is wearing and is seeking protection from is the
6 protection of the claims of the Libby claimants for the failure
7 to warn type causes of actions that the Libby claimants have
8 asserted. And I believe that a bunch of the wind has been
9 taken out of my sails by Your Honor's statement that non-
10 derivative claims will not be channeled to the trust and will
11 not be enjoined.

12 The question is, you know, the -- from what I
13 understand, 524 -- I don't have the number -- the 524(g)
14 permits the insurance companies to potentially obtain
15 protection from claims that arise out of the provision of
16 insurance to the debtors and that it has been the insurer's
17 position that if they undertook activity that gives rise to a
18 state law duty owed to the Libby claimants that they did so
19 only because they provided insurance to the debtor and that
20 that is enough to bring it within the provision of arises by
21 reason -- provision of insurance to the debtor and that they
22 should be entitled to protection against those claims even if
23 those claims by the Libby claimants are claims directly against
24 CNA that can go against CNA's general assets that are not in
25 any way limited by the policy proceeds.

1 THE COURT: Right, and that seems to me to be an
2 issue that's going to be litigated elsewhere. I think my role
3 in confirming the plan is to indicate what's covered by the
4 injunction, and I think Combustion Engineering is quite clear,
5 what's covered by the injunction or claims that are derivative
6 of the debtor.

7 So, to the extent they're derivative and proven to be
8 derivative they're covered. To the extent they're not proven
9 to be derivative and are, in fact, shown to be independent
10 claims, they're not. But, that's not an issue that this
11 Court's going to adjudicate. That's going to go elsewhere.

12 MS. CASEY: Well, then, Your Honor, that does raise
13 the question that was asserted by BNSF in objecting to the
14 plan. The -- in the response to BNSF's objection CNA has taken
15 the, I believe, surprising position that as long as it provides
16 fair and equitable compensation related to the policy and the
17 terms of the policy and the limits of the policy and the
18 potential coverage defenses under the policy, then it is
19 entitled to whatever the full scope of the protection is under
20 the 524(g). If it arises by the provisions, if it's derivative
21 or non-derivative, then all you have to look at is whether the
22 policy proceeds, the settlement amount is fair and equitable
23 looking at the policy proceeds.

24 If there are, in fact, derivative claims that can be
25 asserted against CNA that go above and beyond those policy

1 proceeds, that the rights of the non-debtor party against the
2 solvent non-debtor CNA is to go against the general assets of
3 CNA and not just against the policy proceeds, it cannot be the
4 standard that they are entitled to the full protection of the
5 scope against those derivative claims without there being some
6 just compensation paid to the holders of those derivative
7 claims.

8 And you see that in each -- whichever of the three
9 standards are applicable. The In re Martin standards require
10 that you find that the settlement value be fair and equitable
11 in relation to the claims that are being released and it finds
12 that it be within the paramount interest of the creditors.

13 Continental Airlines tells this Court that in order
14 to get relief from a solvent non-debtor for claims that are
15 against the general assets of a solvent non-debtor this Court
16 must find that it be necessary to the reorganization and that
17 just compensation be provided and be provided to the holders of
18 those claims.

19 And 524(g) requires that in order for them to get
20 protection you must find that it's fair and equitable in light
21 of the benefits to be provided. And if the benefit to be
22 provided by the channeling injunction is protection against
23 derivative claims that are not tied to the policy proceeds and
24 that can be covered by the general assets of CNA there must be
25 a finding that there has been a consideration paid for the

1 release of those claims.

2 So, while there may be an issue as to whether it's
3 derivative or not derivative, and perhaps that's the answer
4 that these failure to warn claims are not derivative, and
5 therefore you don't need to look beyond the policy proceeds
6 because that's all that's being compromised. But, if there is
7 a chance that these claims are being compromised and that these
8 claims are claims that are not limited to the policy proceeds
9 then this Court must make the determination that there is
10 compensation being paid that is fair and equitable in light of
11 that benefit being provided.

12 THE COURT: Well, how would a person who shows some
13 entitlement to coverage under a CNA policy have the ability to
14 go against CNA's general assets when it's the provision of the
15 insurance that provided the obligation that CNA had to cover in
16 the first place? If CNA doesn't have sufficient proceeds under
17 the policies and you get a different independent judgment maybe
18 you can go against those general assets, but I don't see how
19 that's -- I mean that's a leap of faith to say that you go from
20 policy proceeds to assets of the company.

21 MS. CASEY: But, that's not what the Libby claimants'
22 claims are. The Libby claimants' claims are that under Montana
23 state law that the CNA companies undertook certain activities,
24 not the provision of insurance but certain activities such as
25 hygienic studies and other type activities that created a tort

1 duty owed to the Libby claimants to warn the Libby claimants or
2 to protect the Libby claimants from the exposure to asbestos
3 and that these claims are not claims under the policies. These
4 are tort claims that are being asserted against CNA.

5 THE COURT: Well, all the claims are tort claims.

6 MR. SCHIAVONI: Your Honor, BNSF really doesn't have
7 the standing to make these objections.

8 THE COURT: I understand, Mr. Schiavoni, but
9 nonetheless, I agree. BNSF isn't the proper party to be
10 raising these, but I understand where you're going because to a
11 certain extent BNSF has the same type of issue. But,
12 regardless of that fact they're all tort claims. Even the
13 asbestos personal injury claims are tort claim based.

14 MS. CASEY: But, they're tort claims that are tort
15 claims against Grace that are covered by Grace's insurance
16 policy. This is a tort claim against CNA.

17 THE COURT: We've already discussed that. To the
18 extent that there is proof that that tort claim against CNA is
19 derivative of the debtor it's covered by the channeling
20 injunction if the settlement's approved. To the extent there
21 is no such proof and it's determined to be independent it's not
22 covered. That's not something this Court can just sort of, you
23 know, magically determine. That's an issue for the coverage
24 courts.

25 MS. CASEY: And I understand that, Your Honor, but

1 then I question how if you don't know what claims are being
2 included within it then how do you know that the settlement
3 value is fair and equitable for the benefits that are being
4 provided?

5 THE COURT: I do know what's covered. I know that
6 all derivative claims are covered and no derivative -- and no
7 non-derivative claims are covered. So, I do know the universe
8 of claims. What I don't know is anymore than I know what the
9 liability of all the asbestos claims are going to be, and that
10 is what's derivative and what isn't, but that's not my
11 function.

12 The code says that I can channel derivative claims
13 under 524. My obligation is to say fine, derivative claims are
14 channeled. But, the burden of proof isn't here. I haven't had
15 an evidentiary hearing on what is and what isn't derivative. I
16 just simply know -- and of course the word derivative as the
17 circuit pointed out isn't in the statute, but I think we all
18 know what that word means. It seems to work well in this
19 context, so I'm using it in that general sense, not as though
20 it's a statutory term. Okay. Just to clarify.

21 So, to the extent that the liability arises because
22 of something that's related to the debtor or the debtor's
23 product, the debtor's conduct, yes, it can be channeled. To
24 the extent there's an independent duty that any entity; CNA,
25 Montana, whoever had and didn't exercise, it's not channeled.

1 So, it's an issue for the coverage courts.

2 And to determine that -- and so what CNA can settle
3 here is its derivative liability. It can't settle its
4 non-derivative liability because that's not going to be
5 channeled. So, I don't know if that answers the question or
6 not. To the extent that CNA thinks it's settling its
7 non-derivative liability I better hear that because I don't
8 think I can have CNA settle its non-derivative liability. It
9 won't be channeled.

10 MS. CASEY: Well, if you look at the settlement
11 agreement the definition of the asbestos personal injury
12 claims, and therefore the asbestos-related claims, has seven
13 lines related to the failure -- the definition of the failure
14 to warn that says claims that arise out of -- and I don't have
15 it right in front of me, but to paraphrase, claims that arise
16 out of CNA's undertaking of certain studies of the debtors'
17 operations that to the extent those undertakings of the certain
18 of the studies give rise to a duty of CNA to the Libby
19 claimants that those fall within the definition of asbestos
20 claims. And those are the very claims that they are then
21 seeking indemnification for if the subsequent coverage court
22 finds that they are not derivative of the debtors' liability
23 but are, in fact, independent claims.

24 THE COURT: Well, okay. Maybe I didn't read the
25 settlement agreement in that -- in the sense that you're

1 advocating it now. What I took that to mean was that Libby --
2 not Libby, pardon me, that CNA was attempting to settle any
3 claims that would be determined to be derivative. I can't make
4 that determination as to whether they're derivative. I've had
5 no evidentiary hearing. And if that's what the parties are
6 asking me to do I can't do it, so I better hear from them as to
7 specifically what they're talking about.

8 MR. LOCKWOOD: Your Honor, the settlement agreement
9 does not purport to settle the claims of anybody except Grace
10 and CNA between themselves. So, if -- the plan determines what
11 is channeled. The plan does not contain the language that Ms.
12 Casey is referring to in the settlement agreement. So, to the
13 extent that that language is broader than the language in the
14 plan, it simply settles claims between Grace and CNA on that
15 broader definition. It does not amend the plan language as to
16 what's in the injunction. And it seems to me that Ms. Casey is
17 in effect suggesting to you that somehow or another the plan
18 language is being modified by the settlement agreement and
19 that's simply not the case.

20 MR. COHN: Your Honor, that's not what I'm saying. I
21 do understand the way that the settlement is structured. The
22 definition of the asbestos-related claims being compromised do
23 include these failure to warn claims. A condition to the
24 effectiveness of the settlement is that a confirmation order be
25 entered that does, in fact, extend the protections to the

1 definition of the asbestos PI claims in the settlement
2 agreement. And --

3 MR. LOCKWOOD: That's simply not true, Your Honor.
4 There is no such condition in this agreement that makes it
5 conditional on any plan amendment.

6 THE COURT: No, I think she's saying that a condition
7 of confirmation is that the injunction encompasses the
8 settlement agreements, and therefore if the settlement
9 agreement is broader than the plan injunction somehow or other
10 the plan injunction is modified to incorporate the settlement.

11 MR. LOCKWOOD: But, the settlement agreement doesn't
12 involve an injunction, Your Honor. It simply --

13 THE COURT: But, definitionally -- look,
14 definitionally I am not confirming a plan that in any way
15 attempts to put direct liability on behalf of some entity other
16 than the debtor into the plan. I'm not doing it. So, to the
17 extent that anybody has some idea that an injunction is going
18 to issue that will bar claims that are based on non-derivative
19 liability that's not going to happen, folks. It's not. So --
20 and you all know that.

21 MR. LOCKWOOD: Your Honor, nobody is asking you to do
22 that.

23 THE COURT: Okay.

24 MR. LOCKWOOD: Ms. Casey is suggesting that somehow
25 the settlement agreement is going to modify, override, it's

1 going to require some change in the confirmation order. You've
2 made it quite clear what the confirmation order is going to do,
3 and therefore for her to suggest that somehow or another the
4 confirmation order is going to pick up the settlement
5 definition of the injunction rather than the plan definition of
6 the injunction is, (a) not correct as a reading of the
7 settlement order -- settlement agreement, and (b) Your Honor
8 has already told everybody in the room that you're not going to
9 expand the language of the injunction to go beyond what 524(g)
10 authorizes which is what the plan so provides.

11 THE COURT: Okay. If I understood the relationship
12 between these documents the settlement agreement was
13 essentially saying that to the extent that CNA is sued -- and
14 I'll just use Libby -- by Libby for a failure to warn claim the
15 debtor essentially is agreeing that if CNA is found liable the
16 debtor will agree to this indemnity of up to 13 million for
17 anything that CNA has to pay as a result of the fact that that
18 determination would mean that the claim isn't channeled.

19 If CNA is determined to have acted in a fashion that
20 was derivative of the debtor's conduct then the claim goes into
21 the trust and is channeled I should say, not into the trust,
22 the claim is then channeled and there is no independent
23 obligation of CNA to pay. And it seems to me that if that's
24 the relationship between the documents that's okay. Is that
25 the relationship between the documents?

1 ATTORNEYS: Yes, Your Honor.

2 MR. LOCKWOOD: A Greek chorus in response, Your
3 Honor.

4 MS. CASEY: And I would agree with that, as well,
5 Your Honor. The question -- and I'll just say one sentence
6 because I think the question is whether there is evidence that
7 derivative claims that are in excess of the limits of the
8 policy that permit the claimant to seek a derivative claim
9 against CNA, but is not limited to the policy proceeds, that is
10 truly a derivative claim, that -- is there evidence that there
11 is sufficient fair and equitable consideration being provided
12 for that benefit, for that protection against those claims?

13 THE COURT: How could there be a claim against CNA
14 derivative of the debtor that is based on CNA's contractual
15 obligation to provide insurance that somehow or other goes
16 beyond the policy limits of insurance? It can't be a
17 derivative claim to that extent.

18 MS. CASEY: And I agree, Your Honor, but I think that
19 the CNA companies through their failure to warn language in
20 their settlement agreement are hoping that there will be a
21 finding that the failure to warn claims are, in fact,
22 derivative.

23 THE COURT: Well, they may be. I mean some court may
24 make that determination. They may be derivative. I don't know
25 whether there'll be determined to be derivative or not. What I

1 know is, if they are determined to be derivative they can be
2 channeled. If they're determined not to be derivative they
3 can't be channeled and CNA will be independently liable, the
4 trust won't commit one dime to the payment of those claims, and
5 the debtor's settlement doesn't incorporate those claims
6 because the debtor has nothing to do with CNA's direct
7 liability in that circumstance. So, I think this is an
8 argument about a hypothetical that can't exist.

9 MS. CASEY: Okay. Your Honor, I do want to also
10 point out that the -- one of the other objections that was made
11 by BNSF relates to the Montana apportionment of liability
12 statute. That statute is -- let me find it real quick --
13 Statute 27-1-703. This statute provides that a settling and
14 released co-liable defendant can be accorded, placed on the
15 jury verdict, and apportioned some liability to it which would
16 then potentially impact BNSF's liability to the debtors. But,
17 that someone who is immune from suit is not entitled to be put
18 on the jury verdict and cannot have any fault apportioned to
19 it, thus exposing BNSF to a greater potential liability.

20 In this case it is clear that 524(g) and the
21 settlement all require that there be compensation provided to
22 -- that is fair and equitable in light of what is being
23 released. And although everyone has made a point of the fact
24 that this settlement agreement itself doesn't effectuate the
25 release of the Libby claimants' claims against CNA, the

1 mechanism is that the Libby claimants cannot go against the CNA
2 at any point --

3 THE COURT: Well, why are you arguing Libby claims?

4 MS. CASEY: No, this is --

5 THE COURT: I'm sorry, now this what I don't
6 understand how BNSF is involved.

7 MS. CASEY: BNSF is a defendant, okay?

8 THE COURT: Okay.

9 MS. CASEY: BNSF has been sued by the Libby
10 claimants. One of its rights under state law is to plead in
11 non-settling co-liaible defendants, the potential tortfeasors,
12 and another one of its rights is to say, okay, there is a
13 settling and released co-liaible tortfeasor that must have their
14 fault apportioned to it for determining what BNSF's liability
15 is.

16 But, there is a provision of the Montana law that
17 says if there is a potentially co-liaible tortfeasor who is
18 immune from suit they cannot be added to the jury verdict.
19 They cannot be -- have any fault apportioned to it. So,
20 although BNSF does believe that and is requesting this Court to
21 find that, the settlement agreement in conjunction with the
22 plan does require compensation being provided to the holders of
23 the claims that are receiving the protection.

24 And as Your Honor is aware, although the settlement
25 agreement does not require the Libby claimants to release the

1 asbestos protected party, once they recover against the trust
2 they are deemed to have released the asbestos protecting
3 parties, including CNA, BNSF would like it to be clarified that
4 you are not granting CNA immunity from suit, but there is
5 rather a court-mandated settlement of these claims in which the
6 Libby claimants will be receiving compensation through the
7 trust for whatever claims are being enjoined and channeled into
8 the trust.

9 THE COURT: Well, CNA is not being released from suit
10 to the extent that it has some independent duty. I mean if
11 that's what the issue is then CNA -- I've already said that the
12 channeling injunction doesn't cover that. To the extent that
13 it's derivative of the debtor's conduct I think the channeling
14 injunction does prohibit that suit.

15 MR. LOCKWOOD: Your Honor --

16 MS. CASEY: Well, it prohibits it, but it prohibits
17 it with payment to the litigants.

18 MR. LOCKWOOD: -- Ms. Casey is asking you to give an
19 advisory opinion on Montana law basically. She wants you to
20 rule about what the word immunity means in the context that
21 this settlement when there's maybe subsequent litigation in
22 which BNSF as a co-defendant is being sued by the Libby
23 claimants in Montana. That's wholly inappropriate.

24 MS. CASEY: That's not what I'm asking. I'm asking
25 for a clarification that the channeling injunction is based

1 upon the finding that the party entitled to the channeling
2 injunction is making payment that is fair and equitable to the
3 value of the claims that are being affected by the channeling
4 injunction. That it is not -- that there is, in fact, a
5 mechanism by which the creditors of the debtor will receive
6 compensation for the claims that are channeled. And I think
7 that is -- it is what it does.

8 THE COURT: I think we're arguing apples and oranges,
9 so I'm not sure we're on the same page. My understanding of
10 the relationship between the insurer and the debtor is that the
11 insurer's liability is capped by whatever the insurance policy
12 itself says. To the extent that a claim arises from the
13 provision of the insurance policies and is derivative of the
14 debtor, the debtor's conduct, the debtor's products, whatever,
15 which I am just calling the debtor at the moment, then it's
16 channeled. To the extent it is not derivative of the debtor
17 it's not channeled. To the extent it's derivative of the
18 debtor they are settling with the debtor that liability. To
19 the extent it's not channeled they're not settling that
20 liability. I don't know what more --

21 MS. CASEY: And that's what, Your Honor, we were
22 looking for.

23 THE COURT: Okay.

24 MS. CASEY: Thank you.

25 THE COURT: Mr. Lockwood?

1 MR. LOCKWOOD: I'm going to address mostly the
2 certain arguments made by Mr. Cohn for the Libby claimants,
3 Your Honor, and both the debtor and CNA is probably going to
4 speak to some of the other issues as well as covering anything
5 that they don't think I adequately covered.

6 Mr. Cohn in his argument about the non-products issue
7 here has created out of one Fifth Circuit case a sort of -- a
8 new concept as it relates to the settlement of insurance
9 coverage issues in a bankruptcy case involving Section 524(g).
10 He variously labels it -- well, let me back up one sentence.
11 He starts from the premise that insurance coverage is not
12 property of the debtor estate because if it is then all of
13 these other arguments about secondary impact and administration
14 are just adjectives.

15 But, the way he posits it is that non-products
16 coverage which every policy -- comprehensive general liability
17 policy, there's no doubt -- dispute about this or at least as a
18 generalization. I mean obviously there may be exceptions, but
19 the standard CGL policy has two types of coverage; products
20 coverage or completed operations coverage that has an aggregate
21 limit and non-products or operations coverage which typically
22 doesn't have an aggregate limit but has a per occurrence limit.
23 But, it's the same policy.

24 And he starts from the proposition that because the
25 non-products coverage has no aggregate limit, but only has a

1 per occurrence limit, that somehow or another even though that
2 coverage was purchased by the debtor for the purpose of
3 protecting the debtor's assets and business from claims that
4 somehow or another the only parties that have a property type
5 of right in that coverage in the bankruptcy context are
6 claimants.

7 Now, at one level that's an argument that my
8 constituency would kind of like because it would basically
9 isolate in all bankruptcy cases insurance from any control by
10 the bankruptcy court or the debtor or anybody else. The
11 problem with -- but he acknowledges that that argument in
12 theory would cover products -- unexhausted products coverage
13 because it's coverage that would go to pay claims brought by
14 tort claimants just like the non-products coverage would pay
15 claims.

16 But, he has to acknowledge that if you couldn't
17 settle products coverage then you would be confronted with a
18 situation in which (a) you couldn't settle any insurance.
19 Essentially what he's -- you would do is write the -- by reason
20 of provision of insurance out of insurance out of Section
21 524(g) of the code because no insurer would ever be able to
22 settle.

23 And so, he creates this artificial distinction which
24 no court despite his cavalier references to the case law
25 providing this, that and the other thing, no court has ever

1 made this distinction before, that you have in a 524(g) context
2 one category of insureds that can be "administered by the
3 Court," and presumably that means covered by a 524(g)
4 injunction as well as settle because there wouldn't be enough
5 insurance to pay 100-cent dollars to everybody whereas the
6 non-products coverage cannot be "administered by the Court"
7 because it will pay everybody 100-cent dollars, and therefore
8 it has no secondary impact to use his second term on the
9 bankruptcy estate, the bankruptcy case, other claimants, what
10 have you.

11 THE COURT: But, the debtor owns the policy. The
12 debtor can always settle its own policies. If it determines
13 that it's going to settle with the insurer and absorb any
14 liability that the insurance otherwise would've stood for it
15 has that right. And then a claimant -- an unsecured creditor
16 doesn't have the right to tell the debtor not to settle
17 insurance policies. All it has is a claim. And it's entitled
18 to payment from whatever assets are available, one of which may
19 be insurance proceeds. I don't think we're going anywhere with
20 this, Mr. Lockwood.

21 MR. LOCKWOOD: Well, frankly, we agree with -- that
22 was the point I was working up to. Mr. Cohn spent a very long
23 time saying the exact opposite of what you just said, so if
24 we're there I don't need to say anything more about it.

25 THE COURT: I'm getting there because I have to think

1 about Mr. Cohn was saying and taking a look at the briefs.
2 But, it seems to me, and I ruled this way once before, the
3 debtor can always settle its own policies. It owns the
4 policies.

5 So, whether or not the proceeds end up property of
6 the estate to a certain extent determines whether -- depends on
7 whether or not there are proceeds. You don't know if there are
8 proceeds until you know if there are claims. But, it's the
9 debtor's obligation to pay them, not the insurance companies.
10 It's just one asset that the debtor has to look to to pay the
11 claims. So, it can always settle the policies. Whether that's
12 a good economic decision, you know, depends on circumstances.

13 MR. LOCKWOOD: Well, with that, Your Honor, I will
14 move on then. The second argument that Mr. Cohn makes has to
15 do with the insurer wrongdoing claims in which he and -- aided
16 and abetted by Ms. Casey whose client really cannot possibly
17 have standing to make these arguments simply because they're a
18 co-defendant in a tort system. By that token any co-defendant
19 could come in here and argue in favor of direct claimants and
20 that just doesn't make any sense.

21 But, essentially the argument boils down to when you
22 apply the Martin factors to a settlement of insurance you
23 essentially have to isolate each and every issue that that
24 settlement resolves. So, if there's a hundred insurance
25 coverage defenses you have to look at each coverage defense,

1 you have to put on evidence and experts presumably to say,
2 well, your chance of winning coverage defense 1 is ten percent.
3 Your chance on winning coverage defense 2 is 50 percent. Your
4 chance of winning coverage defense 3 is 30 percent. Your
5 chance of winning coverage -- and you take all these risks of
6 winning and losing on each individual issue and then you figure
7 out what is the maximum total amount that somebody could
8 recover if you won all the issues and then you applied these
9 individual coverage discounts to each argument and somehow or
10 another you come up with a total argument -- a total discount
11 against the whole value of the coverage and that's what's
12 necessary to have the market factor satisfied. And that's just
13 not true.

14 Nobody ever does it that way and that's not the way
15 policies are evaluated. I mean people have in the backs of
16 their minds opinions about what issues are or are not riskier,
17 but the more issues there are, and CNA has made it pretty
18 self-apparent notwithstanding Mr. Cohn's effort to kind of flip
19 all these insurance defenses aside and announce that we've got
20 to quantify each and every one of them, that there are a lot of
21 issues, and any given one of them might result in no recovery
22 for non-products claims as well as products claims, and it
23 would be an impossible task.

24 Suffice it to say that what we've got on the record
25 is -- with the exception of this special group of Libby

1 claimants who are basically interested only in their
2 non-products claims and their insurer wrongdoing claims
3 supposedly, coming here and saying that an overall settlement
4 which is approved by the debtor, CNA, the ACC and who
5 represents unlike the Libby claimants all asbestos claimants,
6 the futures representative who unlike Libby represents all
7 future claimants who have had professionals representing them
8 in these negotiations have inadequately made a showing that
9 this settlement is within the low range of reasonableness by
10 taking into account all of these various defenses and the
11 amount of the excess coverage and the supposedly unlimited
12 products -- non-products coverage which by definition couldn't
13 be quantified if it was unlimited, but which as the CNA
14 declaration points out is subject to numerous defenses aimed
15 specifically at the non-products coverage, that that's an
16 inadequate showing.

17 And I would suggest, Your Honor, that what we're
18 being asked to do here in that regard at least is something
19 that would be impossible which is, as I said before, breakdown
20 each and every other defense and come up with the odds of CNA
21 winning or losing it.

22 Then we have this notion again that because the Libby
23 claimants supposedly are special that we have to in addition to
24 the regular 524(g) requirement which would -- will apply to
25 whether CNA's entitled to be a protected party which is the

1 settlement fair and reasonable to the claimants whose claims
2 are being channeled to the trust which includes a whole lot of
3 people other than the Libby claimants, they would engraft a
4 separate requirement not contained in Section 524(g), not
5 contained in Martin which looks at the settlement of the
6 insurance as a whole, as to whether or not the settlement is
7 fair and equitable to the Libby claimants.

8 And apparently, if I heard him correctly, the only
9 way you could determine it's fair and equitable to the Libby
10 claimants is if there was some piece of it that were carved out
11 and given to the Libby claimants because -- or alternatively
12 this Court would have to rule on what the Court has said it's
13 not going to rule on which is the Libby claimants insurer
14 wrongdoer claims which may or may not be channeled in the
15 trust, have any value, and if so what is that value which is --
16 involves essentially this Court undertaking to be -- the tort
17 judge in Montana to evaluate the strengths and weaknesses of
18 both this fact and the law to the Libby claimants claims here.

19 The fact is that what the Libby claimants
20 persistently ignore is that while there may be non-products
21 liability that's being resolved in this settlement which
22 proceeds of which are going to the trust, the Libby claimants
23 are going to be sharing not only in the non-products proceeds
24 that you could attribute as part of the settlement, but to the
25 products coverage which the Libby claimants basically say we

1 wouldn't be entitled to sharing because we've only gotten
2 non-products claims.

3 So -- except that they're not -- they really haven't
4 shown how you could ever create a trust under 524(g) in which
5 each claimant would come in and not only prove the validity of
6 their claim as against the debtor which is required under the
7 TDPs for the trust to pay anything, but also try and trace
8 their insurance rights into the trust corpus which would depend
9 not only on whether they had non-products versus products
10 claims, but when their exposures were.

11 I mean these CNA policies are between 1973 and 1985.
12 If somebody had exposure prior to 1973 beginning in the 1950s
13 or '60s or something like that, then depending upon how you
14 evaluated the insurance law somebody might or might not be
15 entitled to share in the CNA proceeds, but maybe they wouldn't
16 get a hundred percent because some of their claim would get
17 allocated to earlier periods when they had exposure but CNA
18 didn't have coverage. It would be a nightmare. It would be
19 simply a nightmare.

20 There is -- and again, despite references to the case
21 law, there is no case in which in the context of a 524(g) trust
22 anybody has ever suggested that you had to in addition to each
23 claimant proving validity of their claim, they also had to
24 prove their entitlement to whatever their share of the
25 insurance proceeds that got put into the trust as a whole. So,

1 that argument should not and cannot prevail.

2 With respect to the wrongdoing claims, Your Honor, I
3 think you've made it perfectly clear that this is not the forum
4 to have a debate as to whether those claims are or aren't
5 derivative given the fact that it'll be a factual issue,
6 suggestions that the injunction should be clarified or that the
7 confirmation order should in some way or another clarify the
8 injunction as well are reminiscent of the arguments you've
9 heard in the Pittsburgh Corning case about how we just need to
10 have little tweaks here and there. I'm sure that Mr. Cohn
11 could draft something up that would make Mr. Cohn very happy by
12 way of a "clarification" of the injunction. I doubt very much
13 it would make anybody else in the courtroom happy.

14 THE COURT: That's a non-starter, Mr. Lockwood. I've
15 already explained on this record innumerable times what I'm
16 going to do about the scope of the injunction and that's what
17 I'm going to do, so let's move on to something --

18 MR. LOCKWOOD: Thank you, Your Honor.

19 THE COURT: Anyone else on behalf -- Mr. Giannotto?

20 MR. GIANNOTTO: Your Honor, I feel like I should
21 apologize for my client putting up \$84 million with all the
22 objections that are being made here. I think Mr. Lockwood
23 addressed most of the points I was going to address. One of
24 the things I did want to point out is that in our papers we
25 discuss how this non-products coverage, assuming that the Libby

1 claimants' claims are non-products are subject to per
2 occurrence limits, and we believe they would be applicable
3 here.

4 Mr. Cohn cited a case from New York, the Appalachian
5 v. GE case in which he said, well, New York has clearly held
6 that these things would not be solely one occurrence, and
7 that's really inaccurate, Your Honor. The GE case dealt with
8 claims all across the country, not just claims that were in a
9 discreet locale.

10 And in addition, in a footnote, Footnote 3 to that
11 case, the Court discusses how the parties are free to contract
12 as to what they want covered by per occurrence limits or not,
13 and it mentions that the parties there could've included
14 certain language to make it clear that they were grouping these
15 claims under one occurrence, and that language appears in the
16 CNA policies that are at issue here, the primaries. It does
17 not appear in the GE policies that were at issue in that case.

18 I mean our policies specifically say no matter how
19 many injuries, you know, exposure to generally the same
20 conditions, you know, repeated or continuous exposure to the
21 same conditions regardless of how many people is one
22 occurrence. So, it's not here for you to decide whether
23 there's one occurrence or no occurrence, but Mr. Cohn seemed to
24 make it think that we would -- you know, that this was a slam
25 dunk and we were deceiving you. We weren't.

1 I mean I think at bottom as Mr. Lockwood pointed out
2 what the plaintiffs -- what the Libby claimants really want is
3 that the proceeds not be administered by the trust, and all of
4 the cases they cite, none of the cases they cite involve
5 reorganizations as opposed to liquidations. They don't involve
6 situations where a court is going to approve a settlement as
7 being made in good faith and fair and reasonable. There are
8 situations where individuals have a claim and then somebody
9 cancels a policy after the fact or enters into some potentially
10 collusive settlement and the injured worker or the injured
11 person gets nothing. That's not this case.

12 This is a reorganization. It's a case where you're
13 going to have to approve this settlement if it's going to go
14 into affect. The parties have negotiated at length, and that
15 goes to his issue of how do we know, you know, this is a fair
16 and equitable settlement. Mr. Lockwood discussed that, and I
17 want to say that it's fair and equitable.

18 There were a lot of experienced hard-nosed lawyers
19 here and we all believe having gone through all the defenses
20 and all the potential recoveries that this is very fair, and
21 it's very fair to the trust and people who will be claiming
22 from the trust which is the standard under 524(g). Thank you,
23 Your Honor.

24 THE COURT: Ms. Esayan, I think what I don't know is
25 what the debtor's view as to the maximum recovery, I don't know

1 how you make a maximum recovery on the non-products claims, but
2 at least as some products claims on these policies would be.

3 MS. ESAYIAN: Well, all right, Your Honor. On the
4 primary policies the products coverage was already settled some
5 time ago under the first of these four previous settlement
6 agreements that I referred to. So, the asbestos products
7 coverage under the primary policies is no longer at issue and
8 is not part of the settlement calculation at all.

9 I agree that I don't know how it would be possible to
10 place a value on the non-products coverage under the primary
11 policies, coupled with the problem that while there might be
12 some -- while that's supposed to be unlimited in some way there
13 are also costs that Grace has to pay for that coverage. There
14 are deductibles and retrospective premiums and other costs that
15 Grace would have to pay, so I don't know how anyone would ever
16 reach a determination for that amount.

17 For the excess policies that are part of this
18 settlement, there are 16 excess policies. There's a total of a
19 hundred and -- I think it's \$148 million of excess coverage as
20 our motion shows, and we can put in an affidavit about this if
21 we need to, but as our papers show, and this factual aspect is
22 not contested, the excess coverage all sits at very high
23 layers. So, if it's like excess of 70 million or excess of 100
24 million for all of the excess policies, and if you look at it
25 this way, at the time that Grace entered bankruptcy it was only

1 at the 20 million level.

2 So, just reaching those excess policies includes --
3 brings in all kinds of issues and difficulties, and actually
4 CNA has placed that evidence in their affidavit. So, they
5 outline the complications of the debtors or the trust ever
6 reaching the \$150 million worth of excess coverage. So, I
7 believe that's the best that anyone could do in terms of laying
8 the factual predicate for what the value of this coverage is,
9 but if Your Honor needs an affidavit from Grace running through
10 that in some fashion we can provide that.

11 THE COURT: All right. Well, let me find out whether
12 that -- what you've just stated with respect to the excess
13 policies is contested. First of all if I need an affidavit
14 then I'll ask for it, and secondly, with respect to the
15 products coverage having been settled already then I guess
16 that's not part of this calculation on the product side now.

17 I truly don't know how you'd value the non-products.
18 That would depend so much on who made claims at what level and
19 what the defenses were that it seems to me that part of a
20 reason for settlement is that it's not possible to make a
21 reasonable determination as to the likelihood of what any
22 individual could recover or what the debtor collectively could
23 do. So, settling that liability and -- in the lump sum that
24 then everyone can access seems to make more sense, but I'll
25 hear from Mr. Cohn. Maybe he's got a suggestion.

1 MS. ESAYIAN: Thank you, Your Honor. The only thing
2 -- the only other thing I wanted to add was on the one point
3 that Ms. Casey raised about how the attachment to the plan that
4 identifies the settled policies entitled to 524(g) protection,
5 there's the issue about the number -- the policy number for the
6 Grace policy being the same as the policy number for the BNSF
7 policy.

8 We're certainly willing to clarify that in some way.
9 I think the time for us to do that would be if Your Honor
10 approves this settlement we will have to submit an updated
11 version of that attachment to the plan and it'll say -- it'll
12 list CNA as a settled party not only for the previously settled
13 products covered but now for this newly settled coverage, and
14 that's where we would clarify this one BNSF policy.

15 THE COURT: Yes, I think that makes sense, and I
16 think you and Ms. Casey can work out some language that will
17 make it clear which policy is being covered and which isn't.
18 If you have to attach the first page of the policy that
19 identifies the recipients or whatever, I mean you can even do
20 that. But, I don't think you have to go that far, but if you
21 do need to that's fine. I don't think that should be an issue.

22 MS. ESAYIAN: Thank you.

23 THE COURT: Mr. Cohn?

24 MS. DeCRISTOFARO: Your Honor, if I may be heard just
25 briefly.

1 THE COURT: Ms. DeCristofaro.

2 MS. DeCRISTOFARO: Thank you, Your Honor. Just to
3 supplement Mr. Giannotto on two points. And generally I've
4 probably been litigating Grace coverage for a very long time
5 and since I was very young. And I can tell you what everyone
6 is trying to say here about the valuation is, there are a
7 number of moving pieces. If we were to succeed on our defenses
8 on the excess policies, then we're paying 84 million solely for
9 non-products.

10 If we were ultimately to litigate and succeed on the
11 non-products defense and didn't win on the excess then we're
12 paying \$84 million for the excess. But, there's no way without
13 playing all that out to know which -- how this would end up
14 being litigated. So, the price arrived at as everyone has been
15 saying is an evaluation of all those pieces. It's not a
16 separate repaying this for this. It's we're paying for the
17 risk of all of those things.

18 It is CNA's position that the excess will never be
19 reached and worth zero. It's CNA's position that the -- there
20 is no coverage for independent -- or for the Libby claims or
21 claims like Libby. And the other thing that we're paying for
22 that seems to be lost here, this is not about the Libby claims
23 for coverage, there are -- Grace put on at trial they're in
24 potential claims similar to the Libby claims for coverage for
25 non-products all over the country.

1 We're looking for settling all of the coverage, and
2 that's what's in this deal. And I don't think there's any --
3 could possibly be any objection about lack of pricing giving
4 all the moving pieces that are accomplished and that we set out
5 in our affidavit. So, I think there's a full and fair record
6 as to how those pricing was arrived.

7 The second point that I wanted to supplement here was
8 the point raised by Ms. Casey on behalf of BNSF, her second
9 point which is about contractual -- that they are a -- that
10 they have these bystander claims to Grace's coverage. But, I
11 think the relevant document that she didn't refer to, what
12 she's claiming is that they have rights arising out of the
13 contractual indemnification.

14 But, the contractual indemnification which I believe
15 BNSF didn't put it in the record here but which is in the
16 Court's record as BNSF Exhibit 7-A, is the original
17 indemnification provided in the agreement between Grace and
18 BNSF. And that agreement provides that Grace shall obtain a
19 policy of public liability protecting BNSF for specific
20 properties under this easement, this usage agreement.

21 It doesn't say -- so the issue of whether she obtains
22 rights or whether BNSF obtains rights under the Grace primary
23 policies because there's a contractual indemnification, you
24 can't look at that without looking at the terms of the
25 indemnification. The indemnification requires Grace to get a

1 policy naming BNSF.

2 So, if that's the agreement and BNSF is asked to be
3 carved out for those alleged policies naming them, why didn't
4 they have a right to overreach and say they have rights against
5 Grace's policies by virtue of indemnification that doesn't give
6 them those rights? All it does is obligate Grace to obtain the
7 policy naming them. So, on that basis I don't think the second
8 argument made by BNSF for all the other reasons has any
9 validity whatsoever. Thank you, Your Honor.

10 THE COURT: Anyone else before I turn to Mr. Cohn?

11 (No audible response)

12 THE COURT: All right, Mr. Cohn.

13 MR. COHN: Your Honor, I'm not going to try to
14 respond to just all of the really mischaracterizations of the
15 Libby claimants' position that have been thrown at you. I mean
16 I think our papers are perfectly clear as to what we are
17 contending.

18 I did want to make two observations at this point.
19 One of them is that this whole valuation problem that you've
20 referred to and that have been referred to by other parties for
21 the non-products claims stems from the fact that there are no
22 aggregate limits. If there are aggregate limits we would start
23 off at the -- in the case of the excess policies here, you
24 know, the 148 million or whatever the number is, and you'd kind
25 of work down from there. But here it's the very lack of

1 aggregate limits that creates the valuation problem, but it
2 also happens to be --

3 THE COURT: But, that's not actually the case because
4 the problem is that all the claims until they're actually
5 proven are contingent, unliquidated claims, and as a result
6 there is no way to know what the claims are that can be made
7 against those policies and whether or not a claim being made
8 against the policy is really a non-products claim at all at
9 this stage. There just isn't a way to know that. So, it's not
10 just the fact that the policy itself may not have aggregate
11 limits, it's the fact that there may not be any claims that
12 arise under those policies in the periods covered. I don't see
13 how you can value that, Mr. Cohn.

14 MR. COHN: Well, Your Honor, there are only a
15 thousand or so Libby claimants.

16 THE COURT: Yes, but Libby's not the only body of
17 claimants that may have claims under these policies. These
18 claims aren't just -- not all of the policies are strictly
19 limited to a specific facility in Montana.

20 MR. COHN: Well, Your Honor, we're talking about
21 non-products claims first of all.

22 THE COURT: Yes.

23 MR. COHN: I agree that products claims are all over
24 the place. With non-products claims, Your Honor, the -- there
25 was evidence of, you know, a few of them from elsewhere in the

1 country when -- this is when Grace used its best efforts in the
2 context of confirmation to come up with some record about all
3 the other non-products claims that there were. And they came
4 out with -- I forget whether it was four or five, but it was
5 some very small number.

6 The testimony of its own expert -- not expert, but
7 Mr. -- their in-house insurance person, and I apologize, but
8 I'm just -- I'm blocking his name, but it's all there in the
9 confirmation record, was that the Libby claimants are the
10 non-products claimants. If there are a few outliers who are
11 non-products claimants fine, you know, nobody's ever going to
12 say in a case of this magnitude, nobody's every going to say
13 it's zero, but basically he said the Libby claimants are the
14 non-products claimants.

15 And so, it's a group of a thousand claimants, Your
16 Honor, and it is possible to do -- if parties wanted to it was
17 possible for them to do, you know, an estimate. Obviously
18 nobody's ever going to understand without a full adjudication
19 of each claim, you know, what the exact amount is, but nobody
20 ever settles based on exactitude, Your Honor, as -- you know,
21 and that is actually a fair point that the proponents of the
22 settlement have made, and a mischaracterization, frankly, of
23 the Libby position which is we're not saying exactitude is much
24 required.

25 But, we are saying that if you're really going to

1 take what we contend are not even property of the estate which
2 are the proceeds of non-products coverage and you're going to
3 include it in the settlement you've got to figure out what's
4 being given up at least in round numbers, at least in general
5 terms. And -- but I would respectfully submit, Your Honor,
6 that the valuation problem and the fact that it's not property
7 of the estate are very much interrelated and --

8 THE COURT: Well, I can't agree that it's not
9 property of the estate for this reason. The debtor owns the
10 policies. The debtor has a contractual right to do whatever it
11 chooses with those policies. It can settle those policies. If
12 in its best business judgment, assuming that the Martin factors
13 are met because we're in a bankruptcy context, outside
14 bankruptcy, if the debtor's determination is that it's in the
15 best interest of whoever to settle those policies and absorb
16 the liability on its own it has the right to do that, and no
17 claimant against those insurance proceeds has the state law or
18 any other kind of right to stop the debtor from withdrawing its
19 insurance.

20 So, I don't see how the Libby claimants think that
21 they have an entitlement to specific policy proceeds because
22 those claims aren't out there yet. They haven't been
23 adjudicated to be rights against insurance. To the extent
24 there are claims against the debtor, clearly they are claims
25 against the debtor, but how the debtor chooses to pay them is

1 up to the debtor. The debtor doesn't have to use its insurance
2 proceeds for that. It can use whatever assets it chooses.

3 MR. COHN: Well, Your Honor, but for the automatic
4 stay, but for the fact that we've been barred for a period of
5 nine years from litigating those claims, those claims would be
6 adjudicated now. We can't --

7 THE COURT: Well, that may be, but that doesn't mean
8 that --

9 MR. COHN: -- be faulted for not having adjudicated
10 our claims.

11 THE COURT: No, no, I'm not faulting Libby for
12 adjudicating the claims. This is the issue of who controls the
13 outcome of the policies, that's all, and whether or not
14 proceeds can come into the estate. I'm saying it's not the
15 unsecured creditors who control the disposition of the
16 policies, it's the debtor.

17 If the debtor wants to settle the liability under the
18 policies it has the right to do that. It can't get out of the
19 liability that it owes to the people who would've been covered
20 by the insurance, but it doesn't have to look to its insurance
21 assets. And they're not covering -- they're not settling
22 direct claims. So, to the extent you have direct claims you
23 still have direct claims. They're settling derivative claims
24 and they have the right to settle.

25 So, I don't understand the concept that the

1 "proceeds" which are now going to be settlement proceeds coming
2 from an agreement that the debtor has reached to essentially
3 sell its policies isn't appropriate. It's done all the time in
4 lots of context. Heck, you can sell your right to, you know,
5 to the lottery annuities let alone to insurance proceeds.

6 MR. COHN: Except that for the reasons that we state
7 in our brief with the authority cited there it is -- including,
8 you know, insurance treatises, corpus juris secundum, as well
9 as the specific case law --

10 THE COURT: These are written by insurance lawyers.
11 They're not written by bankruptcy lawyers --

12 MR. COHN: No, no, no.

13 THE COURT: -- looking at whether or not these issues
14 are property of the estate.

15 MR. COHN: I fully --

16 THE COURT: And to the extent that the Fifth Circuit
17 somehow can be read to say that it's not property of the
18 estate, quite frankly I think they're wrong.

19 MR. COHN: Well, then, I'm not sure there's --

20 THE COURT: Because of the --

21 MR. COHN: -- what is it -- we understand --

22 THE COURT: -- settlement issue, Mr. Cohn. You know,
23 if there were a policy that somehow or other named the specific
24 beneficiary, you know, that policy may not be able to be
25 settled because there may be "a trust concept," but this

1 doesn't. This simply says the debtor has these proceeds
2 available to settle its own liabilities, and if it chooses to
3 resolve that with CNA I don't see how --

4 MR. COHN: State law, Your Honor, state law imposes
5 what you have just described as basically a trust concept. And
6 under the Butner decision and under, you know, legions of
7 cases, the starting point for the rights of the bankruptcy
8 estate are what rights it has under its property and what other
9 people have to property under state law.

10 THE COURT: Yes, but the starting point for what is
11 property of the estate is a federal determination. And
12 particularly in a mass context case policies are -- and I don't
13 think there's a case out there that says that the policies
14 themselves aren't property of the estate, so --

15 MR. COHN: Agreed.

16 THE COURT: Okay. So, what --

17 MR. COHN: No, agreed, Your Honor.

18 THE COURT: -- the debtor is doing is settling its --
19 is selling, essentially selling its policies back to CNA for a
20 set number, and as a result, instead of having insurance
21 proceeds to look to claimants have settlement proceeds to look
22 to, but that's the debtor's determination. The debtor still
23 has to reconcile its liabilities to the claimants. How it
24 chooses to do that is up to the debtor, so --

25 MR. COHN: Well, Your Honor, we -- you know, we agree

1 that the policies are property of the estate, however, the fact
2 that others can have an interest, and in this case the Libby
3 claimants we assert do have an interest in the proceeds of the
4 insurance coverage, does place limits on what can be settled.

5 THE COURT: I agree. I agree. That's why you have
6 to determine that the settlement is fair and reasonable because
7 there are some limits. You do have to look to why the
8 insurance was out there and whether or not there were existing
9 claimants and so forth. And I'm not in any way suggesting that
10 there can be a fraudulent transfer for example, but that isn't
11 any part of this discussion, Mr. Cohn, and I don't -- didn't
12 mean to go that far if that's what -- if what I said could be
13 interpreted that way.

14 What I'm simply saying is, that the debtor has the
15 obligation, particularly in a bankruptcy, to look at all of its
16 assets and do what's in the best interest of all of its
17 creditors. It has policies out there. Right now those
18 policies are in serious contention in various courts around the
19 country as to whether the debtor can get anything as a result
20 of those policy proceeds or whether the claimants who claim a
21 beneficial interest in those proceeds can get anything.

22 The debtor's business judgment says, look, we're
23 better off settling this liability for a pretty large dollar
24 sum, bringing those proceeds in, and letting the trust
25 procedures distribute them for the benefit of all creditors

1 rather than taking the risk that any one specific creditor or
2 the debtor litigating is going to lose all of the policies for
3 the benefit of everyone.

4 So, which is it going to be, that we continue to
5 litigate and take the risk of loss of losing everything or do
6 we settle and have \$84 million in hand or 71 million, whatever
7 it turns out to be? And the debtor's business judgment is
8 we're better off selling those policies, bringing the proceeds
9 in, and letting the trust distribute.

10 It's a little hard under the circumstances to see how
11 that's not a fair and reasonable determination under the Martin
12 factors and under 524, although I'm not looking at it for plan
13 confirmation purposes, I'm just looking at the mechanism by
14 which this happened. So, because the debtor can control the
15 policies, these are not claims against the policies right now.
16 These are policy issues. The debtor has the right to sell
17 those policies. As a condition of that it has to make
18 provision for how it's going to pay claims, but it's doing that
19 through this plan. It's channeling proceeds to a trust.

20 So, it seems to me that there is no construction
21 under which this Court could come up with the idea that the
22 policies are not property of the estate, and if they're
23 property of the estate the debtor-in-possession has the right
24 to deal with them provided that it does it in a fashion that's
25 fair and equitable to its creditors and that's the issue, is it

1 fair and equitable?

2 And I think the -- this particular settlement does
3 meet those Martin factors for those reasons. Adjudicating the
4 liability on the non-products coverage at this point or even
5 estimating it frankly is a work of fiction I think because it's
6 almost impossible to know who would make claims in what amounts
7 and what the liability would be after all the defenses are
8 reconciled.

9 With respect to the products coverage I agree with
10 the debtor and it's in their papers, that accessing at very
11 high levels is going to be a long time coming, if at all. And
12 I think the trust is well funded through the mechanisms that
13 are established in the plan in addition to policy proceeds.
14 So, I can't -- and the risk of litigation if I haven't
15 addressed that already I think is pretty extreme on both sides.
16 It could amount to an all or nothing issue. So, I can't see
17 how this isn't a wise decision on behalf of the parties
18 involved.

19 MR. COHN: Well, Your Honor, we understand that to be
20 your ruling. We disagree not on the broad issue of whether
21 it's wise to settle or even whether this particular settlement
22 makes sense for products coverage, we simply say that what
23 they're doing is they're settling proceeds of the policy that
24 belong to us and that's not permissible and we'll just -- you
25 may disagree so we'll just leave it at that.

1 THE COURT: Well, I do for the reasons that I've
2 stated, but okay.

3 MR. COHN: All right. So, that brings me then to the
4 second point that I wanted to respond to which is that the --
5 and I'm coming back now to the scope of the Section 524(g)
6 injunction which I -- when I left the lectern last I thought we
7 were in a good place, and then I'm -- and now I'm not so sure,
8 and here's why, Your Honor, and again, this has to do with the
9 fact that the injunction, whatever it is, the injunction has to
10 be clear about what it enjoins and what it doesn't enjoin.

11 And I think that we've become -- that we are clear
12 that at one end of the spectrum there is -- or I shouldn't say
13 one end of the spectrum, but there's a category of claims which
14 are -- which arise under the insurance policies which are
15 basically just insurance companies paying under its insurance
16 policies for Grace's liabilities clearly within -- clearly
17 enjoinable under Section 524(g), and to be enjoined under the
18 plan. The other category is claims arising not under the
19 insurer's contractual obligation to insure Grace's claims, but
20 the insurer's own breach of its tort liability on the insurer's
21 part.

22 THE COURT: Right, I understand.

23 MR. COHN: Right.

24 THE COURT: To the extent that there's a
25 determination that they're a derivative they're channeled. To

1 the extent there's a determination they're not derivative
2 they're not channeled. But, this court isn't the place where
3 that determination's going to be made.

4 MR. COHN: The case law -- all right, Mr. Lockwood
5 doesn't want me to say case law, so why don't I say the Second
6 Circuit decision in the Travelers case points out that that
7 determination whether something is derivative and thus
8 enjoined or whether it arises under an independent duty and
9 therefore is not enjoined is actually a -- it's a clear legal
10 decision. It's based on a legal factor. It is not fact-based.
11 You might recall in that case there was a very --

12 THE COURT: How can it not be fact-based? I mean --

13 MR. COHN: Because --

14 THE COURT: -- there has to be some proof as to what
15 the insurance company did. There has to be an allegation that
16 the insurance company did X --

17 MR. COHN: Oh, of course.

18 THE COURT: -- and that it had an independent duty to
19 do Y, and it didn't do Y, it did X, and that somehow or other
20 that isn't based on anything that is derivative of its
21 provision of insurance to the debtor.

22 MR. COHN: Well, that's --

23 THE COURT: That proof could be advanced.

24 MR. COHN: I'm sorry, Your Honor, I didn't --

25 THE COURT: Okay.

1 MR. COHN: The distinction is, of course, any claim
2 has to have a factual basis, so I didn't mean to suggest that
3 you could just sue insurers even if they didn't do anything
4 wrong. It's simply that it is -- the question whether it's
5 enjoined or not rests upon whether it is a duty of the
6 insurance company that is alleged to be breached in which case
7 it's not enjoined, or whether it is the insurer's contractual
8 obligation of the insurance policy to ensure the insurance
9 liability in which case it is enjoined, and it's a very
10 simple legal distinction. And so, we're simply asking for you
11 to make it just that clear in your order approving the
12 settlement and the confirmation order. That's really what
13 we're asking for.

14 THE COURT: All right. Well, I will take a look at
15 the Travelers decision to see whether I agree with the language
16 the way it's written. My view is -- I don't think I can say it
17 anymore clearly than I've said at least ten times so far today,
18 if it's derivative it's enjoined, if it's not derivative it's
19 not. Who's going to make that determination? Not me.

20 MR. COHN: Thank you, Your Honor.

21 MS. CASEY: Your Honor, just two quick
22 clarifications. Ms. DeCristofaro came up here and explained
23 her view of the -- some of the -- excuse me -- the contracts
24 between BNSF and Grace, that it only included a requirement
25 that Grace purchase insurance for BNSF. It is true that all of

1 the contracts -- I believe there's 13 or 14 of those contracts
2 -- is in the record of the confirmation hearing, and BNSF
3 negotiated three separate protections under those agreements.
4 The first was the requirement that Grace purchase insurance
5 that names BNSF and protects BNSF for activity at the location.

6 It also required an indemnification agreement, and
7 there is, in fact, a specific indemnification agreement in
8 those contracts under which Grace undertook to indemnify BNSF
9 for activities at the location. And that's a rough paraphrase,
10 whatever the language is, but there is, in fact, an
11 indemnification provision.

12 The third protection was the contracts required Grace
13 to obtain insurance naming Grace as the insurer that included
14 the contractual indemnity endorsements and required Grace to
15 provide proof to BNSF of that. So, it is just factually
16 incorrect that there is no indemnification provided by Grace to
17 BNSF.

18 THE COURT: No, I don't think that's what she said.
19 I thought she said that the contracts were based on the
20 indemnities and to understand the contracts of insurance I had
21 to look at the indemnity which provides that Grace does have to
22 get insurance for BNSF at the premises which Grace did --

23 MS. CASEY: Right.

24 THE COURT: -- and then there is this indemnity.
25 But, the indemnity provisions incorporated into Grace's own

1 insurance policies don't name BNSF as an additional insured.
2 They simply say that Grace has an indemnity. Well, I don't
3 think anybody's arguing that Grace doesn't have an indemnity.

4 MS. CASEY: Okay. Well, that was my understanding of
5 what Ms. DeCristofaro was saying.

6 THE COURT: Okay.

7 MS. CASEY: She was saying that the indemnity was
8 just to purchase Grace insurance and not a separate indemnity,
9 and there is, in fact, a separate indemnity.

10 THE COURT: All right.

11 MS. CASEY: The second point that I'd like to raise
12 is with regard to the separate policies. The debtors and CNA
13 have offered to amend either the agreement -- the settlement
14 agreement or the order to clarify that the three policy numbers
15 that BNSF has asserted are not being compromised by that. It
16 seems as though Your Honor is heading towards approving the
17 settlement. We just want to be sure that the settlement is so
18 amended to reflect that before it's approved.

19 THE COURT: I think what I should do is have the
20 debtor provide me with a different order that approves the
21 settlement that incorporates that -- the language that you're
22 looking for Ms. Casey. And I think also makes it clear that
23 this Court's view is that the settlement agreement between the
24 debtor and CNA is the settlement agreement between the debtor
25 and CNA.

1 But, to the extent that there is a definition of
2 asbestos protected party that is going to be driven by the
3 plan, it's the plan language that will control. So, if there
4 is a distinction the plan definition will control, not the
5 settlement agreement, and I think that provision should be put
6 right into the order that approves the settlement. Then we
7 won't have any doubt about it down the road.

8 MS. CASEY: Thank you, Your Honor.

9 THE COURT: Okay. Yes, for the reasons that I've
10 already stated which I don't think I need to go over again, I
11 think the settlement is in the best interest of the parties and
12 this estate and I will approve it, but I think I do need a
13 different order that incorporates the couple of things that
14 have been put on record. Do I need to go over those again or
15 -- Ms. Baer, are you comfortable with what I've ruled so far?

16 MS. BAER: We understand, Your Honor.

17 THE COURT: Okay. And when can I expect to get the
18 order? Because you'll have to run it by --

19 MS. BAER: Your Honor, we'll get it out as soon as
20 possible to the other side with the hope that we can get it
21 here by the end of the week.

22 THE COURT: Oh, okay. So, what I was trying to see
23 is whether I needed to continue this till the next hearing day
24 just in case it's not in --

25 MS. CASEY: No.

1 UNIDENTIFIED ATTORNEY: No.

2 THE COURT: No. Okay. That's fine. I'll take a
3 look at the order when I get it then.

4 MS. BAER: Thank you, Your Honor.

5 THE COURT: All right. Thanks. Is that the end of
6 the Grace --

7 MS. BAER: Your Honor, there's just one matter I
8 wanted to bring to the Court's attention. We had a conference
9 call with the Court at the end of last month when it was clear
10 that confirmation order could not be entered by the end of the
11 month, and at that time you had raised the issue of Canada. I
12 wanted to report that on Canada the parties immediately
13 negotiated a 30-day what I'll call free extension so that the
14 Canadian agreement would not terminate until January 31 in the
15 event that there is no confirmation order.

16 Your Honor, if there is no confirmation order by
17 January 31 the parties further negotiated that Grace at that
18 point would have to contribute an additional \$500,000 to the
19 Canadian settlement fund and the parties have agreed to that in
20 writing and will be filing that in Canada and then we will
21 bring it here on notice so the Court is aware of the terms of
22 the provision.

23 THE COURT: Okay. Well, I truly very much hope that
24 this is going to be done before then, but it's somewhat of a
25 moving target because of the settlements that keep coming up.

1 And I'm never totally sure that one settlement isn't affecting
2 something else that's in the plan or the plan confirmation
3 order, and it requires sort of going back and reanalyzing
4 things. So, are you done with settlements for awhile I guess
5 is the big question? Because if you're not --

6 MS. BAER: We are, Your Honor.

7 MR. DONLEY: Yes, Your Honor.

8 MS. BAER: Yes, Your Honor, we are.

9 MR. DONLEY: Absolutely.

10 THE COURT: All right. Is there going to be any
11 additional plan modification language to the plan,
12 modification, because I think I need all of that before I can
13 actually get to a confirmation order. I really do need a plan
14 that has everything in it that I'm being asked to confirm.

15 MR. LOCKWOOD: There's nothing pending that would
16 involve plan modifications, Your Honor.

17 THE COURT: Except this new exhibit, but that's --

18 MR. LOCKWOOD: Well, that's just an exhibit, yes.

19 THE COURT: Yes, that's okay.

20 MS. BAER: And, Your Honor, the only change that we
21 would make would be a definitional change to include the
22 amendment on Canada that gave us the additional time and puts
23 in the requirement of the additional money if it goes beyond
24 that date.

25 THE COURT: Okay. Well, I don't see that that's a

1 problem.

2 MS. BAER: It doesn't change anything.

3 THE COURT: No. Okay. Thank you for the update, and
4 again, I truly do hope -- I am truly trying to get this done.
5 It's not as though we haven't been working on it, it's just
6 been difficult.

7 MS. BAER: Thank you, Your Honor.

8 THE COURT: Okay. Grace is adjourned. We're taking
9 a ten-minute recess and then we will -- well, let me ask, does
10 anybody else have any other issues in Grace?

11 (No audible response)

12 THE COURT: Okay, hearing none. Grace is adjourned.
13 We're taking a ten-minute recess and then we will start on
14 Flintkote.

15 UNIDENTIFIED ATTORNEY: Thank you, Your Honor.

16 THE COURT: Thanks.

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C E R T I F I C A T I O N

I, KATHLEEN BETZ, court approved transcriber,
certify that the foregoing is a correct transcript from the
official electronic sound recording of the proceedings in the
above-entitled matter, and to the best of my ability.

/s/ Kathleen Betz

KATHLEEN BETZ

J&J COURT TRANSCRIBERS, INC. DATE: January 17, 2011